Form No. 7 PVCo

SAN FRANCISCO

LAW LIBRARY

No. [illegible]

PRESENTED BY

EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book, or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

CC
82

No. 430.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JOEL P. GEER,

Appellant,

vs.

GASTON JACOBI AND CHARLES RUFF, ET AL.,

Appellees.

TRANSCRIPT OF RECORD.

Appeal from United States District Court, District of Washington.

FILED
FEB 1 9 1898

Records of District
Court of Appeals
82

INDEX.

page

Affidavit of Publication 37
Amended Libel 28
Answer to Amended Libel 82
Bond on Appeal 349
Claim of Owner 15
Claimant's Exhibit No. 4 282
Claimant's Exhibit No. 5 284
Claimant's Stipulation for Costs and Expenses 16
Citation on Appeal 352
Citation on Appeal (original)..................... 357
Clerk's Certificate to Transcript 355
Deposition of C. H. Lewis 294
  Direct interrogatories 298
  Cross Interrogatories 302
Deposition of Charles Ruff 42
  Examination in Chief 43
  Cross-examination 45
  Redirect Examination 45
  Recross-Examination 60
  Redirect Examination 72
  Recross-Examination 77
Exceptions to Libel 18
Exhibit "A" 34

page
Exhibit "B" 34
Final Decree 306
Intervening Libel of C. Hennigar 11
Libel 2
Libelant's Exhibit (Receipts) 228
Libelant's Exhibit "AC" 206
Minute Order 21
Minute Order 304
Monition and Attachment for Libel 35
Monition and Attachment for Intervening Libel 39
Notice of Hearing 20
Notice to Set Cause for Trial 107
Notice of Appeal 339
Notice of Appeal 341
Notice to Give Stipulation 345
Opinion 22
Order Allowing Appeal 343
Order Approving Bond on Appeal 348
Order Extending Time to Docket Cause 1
Order to Transmit Original Exhibits 354
Order of Default 305
Order Sustaining Exceptions 27
Order of Reference 108
Petition for Appeal and Assignment of Errors 310
Præcipe for Appearance for Libelants Gaston Jacobi and Charles Ruff 8
Præcipe for Dismissal of Intervening Libel 41
Præcipe for Monition 10
Præcipe for Appearance for Intervenor C. Hennigar. 13

page
Præcipe for Appearance of Claimant 16
Praecipe for Transcript on Appeal 353
Replication to Claim and Answer of Joel P. Geer 109
Stipulation 113
Stipulation of Intervenor for Costs 13
Stipulation of Libelants for Costs 9
Stipulation as to Intervening Libels 347
Supplemental Transcript of Record 359
Testimony for Libelant:
Gustave Jacobi 114
Gustave Jacobi (cross-examination) 134
Gustave Jacobi (redirect examination) 158
C. W. Gould 159
C. W. Gould (cross-examination) 177
C. W. Gould (redirect examination) 188
J. H. Johnson 192
J. H. Johnson (cross-examination) 211
J. H. Johnson (redirect examination) 225
Joel P. Geer 226
F. B. Jones (recalled) 227
J. H. Johnson (recalled) 227
Testimony for Claimants:
Joel P. Geer 229
Joel P. Geer (cross-examination) 244
Joel P. Geer (redirect examination) 257
Francis B. Jones 259
Francis B. Jones (cross-examination) 266
Francis B. Jones (redirect examination) 272
Francis B. Jones (recross examination). 275

Testimony for Claimants—Continued. page

C. W. Gould (recalled) 277

C. W. Gould (cross-examination) 279

C. W. Gould (redirect examination) 280

Joel P. Geer (recalled) 281

Joel P. Geer (cross-examination) 285

F. B. Jones (recalled) 290

F. B. Jones (cross-examination) 290

F. B. Jones (redirect examination) 292

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

JOEL P. GEER,
Claimant and Appellant,

vs.

GASTON JACOBI and CHARLES RUFF,
Libelants and Appellees.

Order Extending Time to Docket Cause.

Upon the representations of the clerk of the District Court of the United States for the District of Washington, Northern Division, and for other sufficient causes appearing, it is by me ordered that the time within which the transcript of the record on appeal in this cause shall be transmitted to and filed with the clerk of the Circuit Court of Appeals for the Ninth Judicial Circuit, be, and the same is hereby, extended to and including the 20th day of February, A. D. 1898.

Dated Seattle, Washington, January 22, 1898.

C. H. HANFORD,
District Judge.

[Endorsed]: Filed Feb. 7, 1898. F. D. Monckton, Clerk.

In the United States District Court for the District of Washington, Northern Division.

IN ADMIRALTY.

GASTON JACOBI and CHARLES RUFF,
Libelants,
vs.
THE STEAMSHIP "EUGENE," and THE PORTLAND and ALASKA TRADING AND TRANSPORTATION COMPANY, and All Others Whom It May Concern,
Respondents.

Libel.

To the Hon. C. H. Hanford, District Judge of said court:

The libel of Gaston Jacobi, a resident and citizen of the State of New York, and Henry Ruff, a resident and citizen of the State of ———, against the steamship "Eugene," the Portland and Alaska Trading and Transportation Company, her alleged owners, and all other persons who may be owners or interested therein, or who may lawfully intervene in this action, which is a cause of civil action and maritime, respectfully show to the Court and allege, for a cause of action in favor of the libelant Gaston Jacobi, as follows:

I.

That during the times herein mentioned, and for a period of several days prior to the filing of this libel, the said steamship "Eugene" has been, and still is, lying in

port in the city of Seattle, State of Washington, bound on voyage, via the port of St. Michaels, Territory of Alaska, to Dawson City, in the Northwest Territory, Dominion of Canada, as libelants are informed and believe.

II.

That during all of the times herein mentioned the said steamship "Eugene" was owned and operated by the said respondent, the Portland and Alaska Trading and Transportation Company, as libelants are informed and believe, which was and is a corporation duly organized under the laws of the State of Oregon; that during all of the times herein mentioned the said respondent, the Portland and Alaska Trading and Transportation Company, was, and still is, as libelants are informed and believe, the owners of and engaged in running and operating a certain other steamship, named the "Bristol," plying between the city of Seattle, Wash., and the port of St. Michaels, Alaska; and that during all of the times herein mentioned one E. B. McFarland was and is the general manager, and one F. C. Davidge & Co., was and is the agent of the said steamship "Eugene" and said "Bristol," and of the said respondent, the Portland and Alaska Trading and Transportation Company, and as such manager and agent were each duly authorized and empowered, on behalf of the said steamship "Eugene" and of said respondent company, to enter into any and all contracts for the transportation or conveyance of passengers or freight or baggage from the city of Seattle, Washington, to said Dawson City, via said port of St. Michaels.

III.

That on or about the 19th day of August, 1897, by and through the said E. B. McFarland, general manager of said steamship "Eugene," and F. C. Davidge & Co.,

agents of said steamship "Eugene," and of said respondent company, the libelant, Gaston Jacobi, engaged passage for himself to be conveyed with three-quarters of a ton of baggage from the city of Seattle, Washington, to Dawson City aforesaid, and purchased of said manager and agents aforesaid two tickets for said passage, one of said tickets being for conveyance of himself and baggage by said steamship "Bristol" from Seattle, Wash., to said port of St. Michaels, Alaska, and the other of said tickets being for the conveyance of himself and said baggage from said port of St. Michaels, Alaska, to said Dawson City, N. W. T., and of which said ticket the following is a true copy, to-wit:

"No. 6. Portland and Alaska Trading and Transportion Company. Good for one passage from St. Michaels, Alaska, to Dawson City, N. W. T., via S. S. 'Eugene.' Name, Gaston Jacobi.

"(Signed) E. B. McFARLAND, General Manager."

That said libelant paid for said first named ticket from Seattle to St. Michaels the sum of one hundred dollars, and for said second named ticket from St. Michaels to Dawson City, the sum of $200.00, and that libelant expended in the purchase of baggage, consisting of a miner's outfit, the sum of $200.00.

IV.

That at the time of purchasing said tickets as aforesaid the said steamship "Eugene" and the said respondent company, owners thereof, caused it to be advertised publicly, and the said steamship "Eugene," through its general manager, agents, and owners as aforesaid, undertook and agreed with libelant that the said steamship "Eugene" would sail from the port of St. Michaels for said Dawson City, on the 24th day of August, 1897, or thereabouts, and would carry libelant over said route.

V.

That the said steamship "Eugene" wholly failed and neglected to keep said contract on its part, and wholly failed and neglected to convey libelant from said port of St. Michaels to said Dawson City, as aforesaid, although libelant was at all times willing and ready to comply with said contract on his part, and did comply therewith; that by reason of said failure of said steamship "Eugene" to comply with said agreement on its part, libelant lost the said amount of $300.00 paid by him for tickets as aforesaid, and lost the sum of $200.00 paid by him for said miner's outfit, the same being by such failure rendered entirely worthless to him, and libelant has lost time by such refusal and failure of the said steamship "Eugene," and has been subjected to delay, inconvenience, in all to his damage in the sum of one thousand dollars.

And for a cause of action in favor of the libelant, Chas. Ruff, said libelant alleges as follows:

I.

That all of paragraphs Nos. I and II of the first cause of action are hereby referred to and made a part of this second cause of action.

II.

That on or about the 10th day of August, 1897, by and through the said E. B. McFarland, general manager of said steamship "Eugene" and of said respondent company and F. C. Davidge & Co., agents of said steamship "Eugene" and said respondent company, the libelant Charles Ruff engaged passage for himself, to be conveyed with three-quarters of a ton of baggage from the city of Seattle, Wash., to Dawson City aforesaid, and pur-

chased of said manager and agents two tickets for said passage, one of said tickets being for conveyance of himself and baggage by said steamship "Bristol" from Seattle, Wash., to said port of St. Michaels, Alaska, and the other of said tickets being the conveyance of himself and baggage from the port of St. Michaels to said Dawson City, N. W. T., and of which said last-named ticket the following is a true copy:

"No. 18. Portland and Alaska Trading and Transportation Company. Good for one passage from St. Michaels, Alaska, to Dawson City, N. W. T., via S. S. 'Eugene.' Name Chas. Ruff.

(Signed) E. B. McFARLAND, General Manager."

That said libelant paid for said first-named ticket from Seattle to St. Michaels the sum of $100.00, and for said second-named ticket the sum of $200, and that libelant expended in the sum of $200.00, and that libelant expended in the purchase of said outfit the sum of $200.00.

III.

That at the time of purchasing said ticket as aforesaid the said steamship "Eugene" and the said respondent company, alleged owners thereof, caused it to be advertised publicly, and the said steamship "Eugene," through its general manager, agents, and owners as aforesaid, undertook and agreed with libelant that said steamship "Eugene" would sail from said St. Michaels for Dawson City on or about the 24th day of August, 1897, and would carry libelant over said route.

IV.

That said steamship "Eugene" wholly failed, neglected, and refused to perform said contract on her part, and failed, neglected, and refused to carry libelant from said St. Michaels to Dawson City, and has failed and

neglected to make said trip or voyage from said St. Michaels to Dawson City, although said libelant fully complied with the terms and conditions of said agreement on his part; that by reason of such neglect, failure, and refusal, said libelant, besides the amount paid out by him for passage as aforesaid, to-wit, the sum of $300, has been damaged in the sum of $1,000.00 for loss of time, inconvenience, and injury to his business, and in the further sum of $200.00, paid by him for said outfit, as aforesaid, the said outfit being now wholly worthless to him.

Wherefore, libelants pray that process in due form of law, according to the rules and practice of this Honorable Court in causes in admiralty, may issue out of this court for the attachment of the said steamship "Eugene," her tackle, apparel, and furniture, and that the said respondent corporation, and all other persons interested as owners or otherwise, be cited to appear and answer under oath, all and singular, the matters aforesaid, and that the Court decree a return of the passage money, to-wit, the sum of $300.00, to each of said libelants, and that the libelants each recover the further sum of $1,200.00 for their damages herein, and that said steamship be condemned and sold to satisfy the same, and that such other and further relief be granted as to the Court may seem just.

JAMES J. EASLY,
Proctor for Libelants.

JOHN C. HOGAN,
Of Counsel.

State of Washington,
County of King. } ss.

Gaston Jacobi, being first duly sworn, on oath says that he is one of the libelants named in the foregoing li-

bel, and makes this affidavit in his own and his colibelant's behalf; that he has read the foregoing bill, knows the contents thereof, and believes the same to be true.

GUSTAV JACOBI.

Subscribed and sworn to before me this 18th day of September, 1897.

[Notarial Seal.] JOHN C. HOGAN,

Notary Public, in and for said State, residing at Seattle, Wash.

[Endorsed]: Libel. Filed Sept. 18, 1897. In the U. District Court. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

United States District Court for the District of Washington.

GASTON JACOBI, et al.,

Plaintiff,

vs.

S. S. "EUGENE," etc.,

Defendant.

Præcipe for Appearance for Libelants Gaston Jacobi and Charles Ruff.

To the Clerk of the above-entitled court:

You will please enter our appearance as counsel and proctors for libelants in the above-entitled cause.

JOHN J. EASLY.
JOHN C. HOGAN.

[Endorsed]: Praecipe for Appearance. Filed Sept. 18, 1897. R. M. Hopkins, Clerk. H. M. Walthew, Deputy Clerk.

In the United States District Court, District of Washington, Northern Division.

IN ADMIRALTY. No. 1,128.

Stipulation of Libelants for Costs.

Whereas, a libel was filed in this court on the 18th day of September, A. D. 1897, by Gaston Jacobi and Charles Ruff, against the steamship or vessel called the "Eugene," her tackle, apparel, and furniture, for the reasons and causes in the said libel mentioned, and the said Gaston Jacobi and Charles Ruff, libelant, and W. B. McGerry, surety, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libelant or their surety, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars.

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned, shall be and are bound in the sum of two hundred and fifty dollars, conditioned that the Gaston Jacobi and Charles Ruff, libelants above named, shall pay all such costs as shall be awarded against them by this Court, or, in case of appeal, by the appellate court.

GUSTAV JACOBI,
CHAS. RUFF.
By JOHN C. HOGAN,
W. B. McGERRY, His Counsel.

Taken and acknowledged before me this 18th day of September, 1897.

JOHN C. HOGAN,
Notary Public Residing at Seattle, Wash.

United States of America, }
District of Washington. } ss.

W. B. McGerry, being duly sworn, each for himself, says that he is a resident of the State of Washington, is worth the sum of five hundred dollars, over and above all his just debts and liabilities and property exempt from execution.

W. B. McGERRY.

Sworn to this 18th day of Sept., A. D. 1897, before me.
[Notarial Seal.] JOHN C. HOGAN,
Notary Public Residing at Seattle, Wash.

[Endorsed]: Stipulation of libelant for costs. Filed Sept. 18, 1897. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy Clerk.

United States District Court for the District of Washington.

GASTON JACOBI, et al.,
vs. } No. 1,128.
STEAMSHIP "EUGENE."

Præcipe for Monition.

To the Clerk of the above-entitled Court:

You will please issue monition and attachment, and deliver same to marshal for service.

JOHN J. EASLY.
JOHN C. HOGAN.

[Endorsed]: Praecipe. Filed Sept. 18, 1897. R. M. Hopkins, Clerk. H. M. Walthew, Deputy Clerk.

In the United States District Court for the District of Washington, Northern Division.

IN ADMIRALTY.

C. HENNIGAR, Libelant, vs. THE STEAMER "EUGENE," Her Tackle, Apparel, etc.	No. 1,128.

Intervening Libel of C. Hennigar.

To the Honorable Cornelius H. Hanford, Judge of said Court:

The intervening libel of C. Hennigar against the steamer or vessel "Eugene," her tackle, apparel and furniture, whereof now is or late was master, in a case of action, civil and maritime, alleges as follows:

First.—That between Sept. 1, 1897, and Sept. 20, 1897, said libelant performed labor and services upon said steamer "Eugene" at the special instance and request of the master thereof, and that in pursuance of said request libelant did haul out said steamer and repair the same upon libelant's shipways at Ballard, Wash., and that libelant will be compelled to launch said steamer. That the reasonable value of said repairs, hauling out, launching and for time on said ways is ($550) five hundred and fifty dollars; that payment was demanded but refused.

2. That the said vessel, her tackle, etc., is now within the said district.

3. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore the said intervening libelant prays that process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said vessel, her tackle, apparel and furniture, and against all persons lawfully intervening or having any interest therein, and that they, and each of them, may be cited in general and special to answer the premises, and all due proceedings being had, that the said vessel, her tackle, etc., may be condemned and sold to pay the claim aforesaid; and that the said intervening libelant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

C. HENNIGAR.

Sworn to Sept. 20th, 1897, before me.

[Notarial Seal.] FRED. H. PETERSON,

Notary Public Residing at Seattle, Wash.

FRED H. PETERSON,

Proctor for Intervening Libelant.

[Endorsed]: Intervening Libel of C. Hennigar. Filed Sept. 20, 1897. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

United States District Court for the District of Washington.

C. HENNIGAR,
Libelant,
vs.
THE STEAMER "EUGENE." ,
No. 1,128.

Præcipe for Appearance for Intervenor C. Hennigar.

To the clerk of the above-entitled court:

You will please enter my appearance as proctor for libelant in the above-entitled cause.

FRED H. PETERSON,
Proctor for Libelant.

[Endorsed]: Praecipe for appearance. Filed Sept. 20, 1897. R. M. Hopkins, Clerk. H. M. Walthew, Deputy Clerk.

In the United States District Court, District of Washington, Northern Division.

IN ADMIRALTY. No. 1,128.

Stipulation of Intervenor for Costs

Whereas, an intervening libel was filed in this court on the 20th day of September, A. D. 1897, by C. Hennigar against the steamer or vessel called the "Eugene," her tackle, apparel and furniture, for the reasons and causes in the said intervening libel mentioned, and the said Hennigar, libelant, and surety, the parties hereto, hereby consenting and agreeing that in case of

default or contumacy on the part of the libelant or his surety execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars.

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and is bound in the sum of two hundred and fifty dollars, conditioned that the said Hennigar, libelant above named, shall pay all such costs as shall be awarded against him by this Court, or in case of appeal, by the appellate court.

C. HENNIGAR.
By FRED H. PETERSON,
His Atty.
E. B. FOWLER.

Taken and acknowledged before me this 20 day of September, 1897.

[Notarial Seal] FRED H. PETERSON,
Notary Public Residing at Seattle, Wash.

United States of America,
District of Washington, } ss.

E. B. Fowler, being duly sworn, each for himself says that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities and property exempt from execution.

E. B. FOWLER.

Sworn to this 20th day of Sept., A. D. 1897, before me.
[Notarial Seal] FRED H. PETERSON,
Notary Public Residing at Seattle, Wash.

[Endorsed]: Stipulation of libelant for costs. Filed Sept. 20, 1897. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

Claim of Owner.

District of Washington, }
Northern Division. } ss.

To the Hon. C. H. Hanford, Judge of the District Court of the United States for said District:

Joel P. Geer, master of the steamboat "Eugene," now within the District of Washington, for and on behalf of Yukon Transportation Company of Portland, Oregon, owner of the vessel called the "Eugene," her tackle, apparel and furniture, intervening for interest in said vessel, her tackle, etc., appears before this Honorable Court and claims said vessel, her tackle, etc., and states that Yukon Transportation Company of Portland, Oregon, is the true and bona fide owner thereof. And thereupon the said claimant prays that this Honorable Court will be pleased to decree to him a restitution of the said vessel, her tackle, etc., and otherwise right and justice to administer in the premises.

And the said Joel P. Geer, being duly sworn, deposes and says that no other persons except the said Yukon Transportation Company of Portland, Oregon, is owner of the said vessel, her tackle, etc., or of any part thereof, and that this affiant is master of said vessel, and the lawful bailee thereof on behalf of said owner.

JOEL P. GEER.

Subscribed and sworn to before me this 4th
[Notarial Seal] C. E. REMSBERG,
Notary Public.

[Endorsed]: Claim of Owner. Filed Oct. 5, 1897. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy Clerk.

United States District Court for the District of Washington.

GASTON JACOBI, et al.,		
vs.		No. 1,128.
S. S. "EUGENE," etc.,		

Præcipe for Appearance for Claimant.

To the Clerk of the above-entitled court:

You will please enter our appearance as proctors for claimant and owner in the above-entitled cause.

WILLIAMS, WOOD & LENTHICUM,
STRUDWICK & PETERS.

[Endorsed]: Praecipe for appearance. Filed Oct. 5, 1897. R. M. Hopkins, Clerk. H. M. Walthew, Deputy Clerk.

In the United States District Court, for the District of Washington, Northern Division.

IN ADMIRALTY, No.

Claimant's Stipulation for Costs and Expenses.

Whereas, a libel was filed in this court on the day of September, A. D. 1897, by Gaston Jacobi and Charles Ruff, libelants against the steamship "Eugene" and the Portland and Alaska Trading and Transportation Company, and others, for the reasons and causes in said libel mentioned, and whereas a claim has been filed in the said cause by the Yukon Transportation Company of Portland, Oregon, and the said Yukon Transportation

Company and H. W. Castleman, his surety, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the said claimant or its surety execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands.

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulator undersigned, and each of them, is hereby bound in the sum of two hundred and fifty dollars, conditioned that the claimant above named shall pay all costs and expenses which shall be awarded against by the final decree of this Court, or upon an appeal, by the appellate court.

YUKON TRANSPORTATION COMPANY.
By W. A. PETERS, Atty.
H. W. CASTLEMAN.

Taken and acknowledged this 5 day of Oct., A. D. 1897, before me.

[Notarial Seal] W. A. PETERS.
Notary Public, in and for the State of Washington,

District of Washington, }
Northern Division. } ss.

H. W. Castleman, party to the above stipulation, being duly sworn, says that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities and property exempt from execution.

H. W. CASTLEMAN.

Sworn to this 5 day of Oct., A. D. 1897, before me.

[Notarial Seal] W. A. PETERS,
Notary Public, in and for the State of Washington,
Residing at Seattle.

[Endorsed] Claimant's stipulation for costs and expenses. Filed Oct. 5, 1897. R. M. Hopkins, Clerk. H. M. Walthew, Dep.

In the District Court of the United States for the District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,

Libelants,

vs.

THE STEAMSHIP "EUGENE" and THE PORTLAND AND ALASKA TRADING AND TRANSPORTATION COMPANY, and All Others Whom It May Concern,

Respondents.

Exceptions to Libel.

To the Honorable C. H. Hanford, Judge of the above-en titled court:

Now comes Joel P. Geer, claimant of the steamboat "Eugene," for and on behalf of the owner of said vessel, the Yukon Transportation Company of Portland, Oregon and excepts to those portions of said libel in relation to the claim of libelant Gaston Jacobi, contained in articles 2, 3, 4, and 5, of said libel, on pages 1 and 2 thereof, and to each and all thereof, in so far as said articles seek to establish or maintain a claim against said steamboat, "Eugene," or to establish a maritime lien thereon; for the reason that the allegations thereof do not disclose any admiralty or maritime claim or lien upon said vessel, whereupon an attachment should be found, and the same are impertinent and insufficient.

And claimant excepts to those portions of said libel in relation to the claim of libelant Charles Ruff contained in paragraph 2 of the first cause of action, made a part

of article 1 of said claim of said libelant Charles Ruff, and to articles 2, 3, and 4 thereof, all contained in page 3 of said libel, and to each and every part thereof; for the reason that the allegations thereof do not disclose any admiralty or maritime claim or lien upon said vessel whereupon an attachment should be found, and the same are impertinent and insufficient in that respect. Claimant further excepts to said libel in that same is defective in form, and not in accordance with the 23d rule of practice of the United States Courts in causes of admiralty jurisdiction, in this, that the nature of the cause is nowhere stated therein, nor whether it be a cause civil or maritime, or a cause of contract, or of tort, or of damage.

And claimant further excepts to said libel in this, that he is advised that there is a misjoinder of parties herein, in that the steamboat "Eugene" and the Portland and Alaska Trading and Transportation Company, and all others whom it may concern, are made parties respondent, which, by the principles of pleading, as well as by the rules of practice of this Honorable Court, cannot be joined in the same libel.

Wherefore, claimant prays that the libel may be dismissed with costs.

WILLIAMS, WOOD & LINTHICUM,
Of Portland, Oregon.
STRUDWICK & PETERS.
Proctors for Claimant.

State of Washington, }
County of King. } ss.

I, J. C. Flanders, one of the proctors for the claimant in the above-entitled cause, do hereby certify that I have compared the foregoing copy of exceptions to libel with

the original thereof; and that the same is a full, and true and correct copy of such original, and of the whole thereof.

J. C. FLANDERS,
Of Proctors for Claimants.

Due service of the within 4 by certified copy, as prescribed by law, is hereby admitted at exceptions to the libel, , 1897.

J. J. EASLY,
Proctor.

[Endorsed]: Exceptions to libel. Filed Oct. 5, 1897. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

IN ADMIRALTY.

GASTON JACOBI and CHARLES RUFF,
Libelants,

vs.

THE STEAMSHIP "EUGENE" and THE PORTLAND AND ALASKA TRADING AND TRANSPORTATION COMPANY, and All Others Whom It May Concern,
Respondents.

Notice of Hearing.

To Messrs. Williams, Wood & Linthicum, and Strudwick & Peters, Proctors for Claimant Joel P. Geer, on behalf of the Yukon Transportation Co.:

Take notice that at the courtroom of the above-entitled court, in the city of Seattle, Wash., on Monday, the 11th day of Oct., 1897, at the hour of 10 o'clock of said day, or as soon thereafter as the same can be heard, the above-named libelants will call up for argument and decision by the Court, the exceptions to the libel in said cause, interposed by the said Joel P. Geer.

Dated Oct. 6th, 1897.

JOHN J. EASLY,
Proctor for Libelants.

JOHN C. LOGAN,
Of Counsel for Libelants.

Service of copy admitted this 6th day of Oct., 1897.

WILLIAMS, WOOD & LINTHICUM,
STRUDWICK & PETERS.

[Endorsed]: Notice of Hearing. Original. Filed Oct. 9, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

October 12, 1897.

General Order Book, District Court, Vol. 3, page 418.

GASTON JACOBI,
v. No. 1,128.
S. S. "EUGENE,"

Minute Order.

Now, on this day, this cause coming on to be heard upon claimant's exceptions to the libel on file herein, the

Court, after hearing argument of respective counsel, takes said matter under advisement.

In the District Court of the United States, District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,
Libelants.
vs.
THE STEAMSHIP "ENGENE."
Respondent.

Opinion.

Filed October 23, 1897.

In Admiralty. Libel in rem by Gaston Jacobi and Charles Ruff against the steamship "Eugene," to recover passage money and damages for breach of contract to carry the libelants, with their baggage, from Seattle, via St. Michaels in Alaska, to Dawson City, in the Northwest Territory. Heard on exceptions to the libel. Exceptions sustained.

JOHN C. HOGAN, for Libelants.

J. C. FLANDERS, for Claimant.

HANFORD, District Judge.—Each of the libelants alleges that the Portland and Alaska Trading and Transportation Co., a corporation, being at the time owner of the steamship "Eugene," entered into a contract to carry him with his baggage, on board the steamer "Bristol," from the city of Seattle, in the State of Washington, to St. Michaels in Alaska, and thence on board the

steamer "Eugene" to Dawson City, and thereupon issued two tickets, one being for passage from the city of Seattle to St. Michaels, for which he paid $100.00, and the other for passage from St. Michaels to Dawson City, for which he paid $200.00. A breach of the contract is alleged in this, that the steamer "Eugene" wholly failed to go to St. Michaels to receive the libelants, as agreed. The libelants allege that they have been injured and damaged by loss of the amount paid for their passage, and the cost of a miner's outfit, and loss of time, for which they each claim damages in the sum of $1,000.00

The authorities are conflicting on the point as to whether a suit in rem can be maintained for breach of an executory contract to carry a passenger on board a particular vessel where the vessel has not entered on performance.

In the case of The Pacific, Fed. Cas. No. 10,643, it was held by Mr. Justice Nelson that in the case of a contract maritime in its nature and subject, it is not essential to give jurisdiction to an admiralty court, in a suit in rem, that the vessel should have entered on the performance, or that the breach should have occurred in the course of the voyage, and that when the contract has been entered into for the conveyance of goods or persons in a particular ship, the liabilities of the owner and of the ship attach at the same time.

In the case of The General Sheridan, Fed. Cas. No. 5,319, Judge Blatchford, held that the decision by Mr. Justice Nelson in the Pacific case, had been overruled by the Supreme Court in the cases of The Freeman v. Buckingham, 18th Howard 182; and Vanderwater v. Mills, 19th Howard, 82. These two cases may be regarded as the leading cases on opposite sides of the question. In a dictum by Judge Lowell in Oakes v. Richardson, Fed. Cas. No. 10,390, which was a suit in personam, the decisions of the Supreme Court supposed to overrule the

Pacific case, are treated as dicta, not having the force of decisions. In the case of The Williams, Fed. Cas. No. 17,710, in an elaborate opinion showing a careful examination of the numerous authorities, Judge Emmons sustained and followed the ruling of Mr. Justice Nelson. In the case of Scott v. The Ira Chaffee, 2 Fed. Rep. 401, Mr. Justice Brown, then sitting as District Judge for the Eastern District of Michigan, and who appears by the report of the Williams case to have successfully argued for the jurisdiction before Judge Emmons, denied the authority of that decision. Referring to the decisions of the Supreme Court in 18th and 19th Howard, he says:

"Those cases cannot be said to have definitely fixed the measure of liability. They seem rather to have announced in general terms a doctrine from which the Supreme Court has not as yet shown any disposition to recede."

Then after reviewing at length the American and foreign authorities, he reaches the conclusion that the owner of a cargo has no lien on the vessel for the breach of a contract of affreightment until the cargo, or some portion, has been laden on board, or delivered to the master. In the case of The Monte A., 12 Fed. 331, Judge Brown, of the Southern District of New York, carefully reviews the decisions, and in his conclusion sustains the ruling of his predecessor in the case of the General Sheridan.

In subsequent decisions, the Supreme Court seems to have regarded the declarations contained in the decisions in 18th and 19th Howard, as expressing the doctrine of that Court, and not as mere dicta. Mr. Justice Davis, in the opinion of the Court in the case of King v. The Lady Franklin, 8 Wall, 325-329, says:

"The doctrine that the obligation between the ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master, has been so often discussed and so long settled, that

it would be useless labor to reiterate it, or the principles which lie at its foundation. The case of The Freeman v. Buckingham, decided by this Court, 18th How. 182 is decisive of this case. It is true the bill of lading there was obtained fraudulently, while here it was given by mistake; but the principle is the same, and the Court held in that case that there could be no lien, notwithstanding the bill of lading. The Courts say: 'There was no cargo to which the ship could be bound, and there was no contract for the performance of which the ship could stand as security.' "

And again, in an opinion by Mr. Justice Davis, in the case of The Keokuk v. Robson, 9 Wall. 517-521, he reiterates:

"It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on the vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master, or some one authorized to receive it. (The Freeman v. Buckingham, 18th Howard, 188.)"

In an opinion by Mr. Justice Clifford, in the case of The Delaware v. Oregon Iron Company, 14 Wall. 579-606, the case of The Freeman v. Buckingham, 18th Howard 182, is cited as an authority supporting the proposition that bills of lading, duly executed in the usual course of business, bind the owners of the vessel if the goods were laden on board or were actually delivered into the custody of the master:

"But it is well-settled law that the owners are not liable if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board or delivered into the custody of the carrier or his agent."

These authorities are conclusive on the point that the right to proceed in rem for breach of a contract of affreightment does not exist unless the cargo, or a portion of it, has been delivered to the master of the vessel, or to his authorized agent. The authorities also hold that ships engaged in carrying passengers on the high seas stand on the same footing of responsibility, according to the maritime laws, as those engaged in carrying merchandise. (1 Am. & Eng. Enc. of Law, 2 ed., pp. 661-662.)

The weight of authority bears so strongly against the position of the libelants, that I am unwilling to set up my judgment in opposition. According to the authorities, it is not the making of a contract, nor the payment of the consideration therefor, which renders the vessel liable. The lien upon which the right to proceed in rem depends, does not attach until the goods or passenger have been placed within the care and under the control of the ship's master.

In the argument of the exceptions, it was insisted that the contract being entire, both vessels became liable from the time libelants started on their journey from Seattle to St. Michaels; but the libel fails to allege that they even rendered themselves or placed their baggage on board the steamer "Bristol," or that performance of the contract on the part of the owner of the vessels was ever commenced.

Exceptions sustained.

C. H. HANFORD,

Judge.

[Endorsed]: Opinion. Filed Oct. 23, 1897. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,

Libelants

vs.

THE STEAMSHIP "EUGENE" and THE PORTLAND AND ALASKA TRADING AND TRANSPORTATION CO.,

Respondents.

Order Sustaining Exceptions.

The above-entitled action coming on to be heard upon the exceptions of the claimant, the Yukon Transportation Co., to the libel herein, on the 12th day of Oct., 1897, and after hearing the arguments of counsel of the respective parties, the Court being fully advised in the premises—

It is ordered that the said exceptions to the libel herein be, and the same hereby are, sustained, and libelants are given leave to amend their libel herein.

Dated this 23d day of Oct., 1897.

C. H. HANFORD.

Judge.

[Endorsed]: Order. Filed Oct. 23, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

IN ADMIRALTY.

GASTON JACOBI and CHARLES RUFF,
Libelants.

vs.

THE STEAMSHIP "EUGENE" and THE PORTLAND AND ALASKA TRADING AND TRANSPORTATION CO.,
Respondents.

Amended Libel.

To the Hon. C. H. Hanford, District Judge of said Court:

Now come the above-named libelants, Gaston Jacobi, a citizen of the United States and resident and citizen of the State of New York, and Charles Ruff, a resident and citizen of the State of Iowa, and, leave of Court being first obtained, make and file this their amended libel in the above-entitled action, against the steamship "Eugene," her tackle and furniture and apparel, and the Portland and Alaska Trading and Transportation Co., owners thereof, and all other persons who may intervene lawfully in this action, which is an action on contract and maritime; and for a cause of action in favor of the libelant Gaston Jacobi, allege as follows:

I.

That at the time of the commencement of this action and the filing of the original libel herein, the said steamship "Eugene" was lying in the waters of Puget Sound, at or near the port of Seattle, in the State of Washing-

ton, and within the jurisdiction of the above-named court.

II.

That during all of the times herein mentioned the said Steamship Eugene was owned and operated by the said Portland and Alaska Trading and Transportation Co., which was and is a corporation organized and existing under and by virtue of the State of Oregon, entitled to do business within the State of Washington, having complied with the statutes of said last-mentioned State in relation thereto, and was engaged during the times herein mentioned as a common carrier by water of passengers, baggage, and freight between said city of Seattle, Wash., and Dawson City, in the N. W. T., Dominion of Canada; and that during all of said time one E. B. McFarland was the general manager and one C. W. Gould was the agent of the said steamship "Eugene" and of said respondent company, duly authorized and empowered to enter into any and all contracts on behalf of said steamship "Eugene" and of said company for the transportation of passengers, baggage, and freight, from said city of Seattle, Wash., to said Dawson City, N. W. T.; and during all of said time the said respondent engaged in operating a certain other steamship known as the Bristol in connection with its said business as a common carrier between the points aforesaid.

III.

That on or about the 11th day of August, 1897, and prior and subsequent thereto, the said steamship "Eugene" and respondent company, through her owners, manager, and agent as aforesaid, caused it to be publicly and extensively advertised that the said steamship "Eugene," in tow of the said steamship "Bristol," would

leave the said city of Seattle, Wash., for Dawson City N. W. T., on the 23d day of August, 1897, and would transport and carry passengers to the number of 350 or less, including their baggage and freight, not to exceed 1,500 pounds each, and would reach said Dawson City not later than the 15th day of Sept., 1897; a copy of two of which advertisements is hereto attached and marked Exhibit "A" and Exhibit "B," respectively.

IV.

That relying upon the good faith of said advertisements, and believing the representations therein made to be true, and upon the further oral representations and promises of a like nature made to said libelant by the said owners, general manager, and agent of said steamship "Eugene," said libelant Gaston Jacobi, on or about the 19th day of August, 1897, made and entered into a contract with the said steamship "Eugene," through her said owner, manager, and agent, wherein and whereby the said steamship "Eugene" undertook, promised, and agreed to carry libelant from the said city of Seattle, Wash., to the said Dawson City, N. W. T., via the port of St. Michaels, and would leave Seattle, Wash., on said voyage on the 24th day of August, 1897, and would reach said Dawson City not later than Sept. 15th, 1897; and among other things it was understood and agreed by and between said steamship "Eugene," through its said owner, agents, and manager, and this libelant, that the said steamship "Eugene" would leave the said city of Seattle, Wash., on said voyage in tow of the said steamship "Bristol," and would be towed by the said "Bristol" from Seattle to said port of St. Michaels, Alaska, from which place the said "Eugene" would continue said voyage alone up the Yukon river, to said Dawson City, and would reach there on Sept. 15th as aforesaid, and in consideration of said promises and agreements on the part

of the said steamship "Eugene," this libelant, at the date aforesaid, engaged passage on said steamship from Seattle, Wash., to said Dawson City, and paid therefor the passage money, amounting to the sum of three hundred dollars for the conveyance of himself and 1,500 pounds of baggage, and received tickets for said passage.

V.

That said libelant performed all of the terms and conditions of said contract on his part to be performed, and on or about the said 24th day of August, 1897, the said steamship "Eugene" entered upon the performance of said contract on her part, and left said city of Seattle, Wash., in tow of the said steamship "Bristol," and undertook to carry libelant and other passengers over the whole of said voyage and proceeded on said voyage upon the high seas for a distance of upwards of six or seven hundred miles up to the coast of Alaska, when the said steamship "Eugene" abandoned the said voyage and refused to proceed further thereon, and this libelant was landed at the city of Victoria, B. C., and said steamship "Eugene" wholly failed and neglected to keep said contract on her part.

VI.

That this libelant, on the faith of said representations and agreements on the part of said steamship "Eugene," went to a large expense to prepare himself for said voyage, and purchased an outfit therefor at an expense of $200.00, which was, by the failure of said ship to keep said agreement, rendered valueless to him, and lost a large amount of time during which he was hindered in carrying on his business, or doing any work, in all to his damage in the sum of $1.000.00.

I.

And for a cause of action in favor of the libelant Charles Ruff, libelants allege:

That paragraphs Nos. I, II, and III of the first cause of action is hereby referred to and made a part of this second cause of action.

II.

That relying on the good faith of said representations, and believing same to be true, and upon the further oral representations and promises of a like nature made to this libelant by the said owner, manager, and agent of the said steamship "Eugene," said libelant, Charles Ruff, on or about the 19th day of August, 1897, made and entered into, a contract with the said steamship "Eugene," through her said agent, manager, and owner, wherein and whereby the said steamship "Eugene" undertook promised, and agreed to carry libelant from said city of Seattle, Wash., to said Dawson City, and to leave Seattle on said voyage on the 24th day of Aug., 1897, and would reach said Dawson City, and not later than Sept. 15th, 1897, and among other things it was understood and agreed between said steamship "Eugene" and this libelant that the said steamship "Eugene" would leave the said city of Seattle on said voyage in tow of said steamship "Bristol," and would be towed by the said "Bristol" from Seattle to St. Michaels, Alaska, from which place the said "Eugene" would continue said voyage alone up the Yukon river to said Dawson City; and in consideration of said promises and agreements on the part of said steamship "Eugene," this libelant engaged passage for said voyage from Seattle, Wash., to Dawson City, and paid therefor the passage money, amounting to the sum of three hundred dollars, for the conveyance of himself and 1,500 pounds of baggage.

IV.

That this libelant performed all the terms and conditions of said contract on his part to be performed, and on or about the 24th day of Aug., 1897, the said steamship "Eugene" entered upon the performance of said contract on her part and left the said city of Seattle, Wash., in tow of the said steamship "Bristol,' and undertook to carry libelant and other passengers over the whole of said voyage, and proceeded on said voyage upon the high seas for a distance of upwards of six or seven hundred miles, when she abandoned said voyage and refused to proceed further thereon, and this libelant was put off said ships at the city of Victoria, B. C.

V.

Tht by reason of the failure of said steamship to perform said contract on her part, this libelant was greatly damaged, in the manner following: That on the faith of said representations and contract he prepared himself for said voyage at an expense of $200.00 in money, and was hindered and prevented from carrying on his business for a long period of time, in all to his damage in the sum of $1.000.00.

Wherefore, libelants pray that process in due form of law may issue for the attachment of said steamship "Eugene," her tackle, apparel, and furniture, that the Court decree a return of the passage money, to-wit, the sum of $300.00, to each of these libelants, and that the libelants each recover the further sum of $1,000.00 for their damages herein, and that said steamship be condemned and sold to satisfy the same, and for such other and relief be granted as to the Court may seem just.

GUSTAV JACOBI,
CHARLES RUFF,
Libelants.

State of Washington,
County of King. ss.

Gaston Jacobi and Charles E. Ruff, being first duly sworn, each for himself, on oath says that he is one of the libelants named in the foregoing libel, that he has read the foregoing libel, knows the contents therefor, and believes the same to be true.

GUSTAV JACOBI,
CHARLES RUFF,

Subscribed and sworn to before me this 22d day of Oct., 1897.

[Notarial Seal] JOHN C. HOGAN,
Notary Public, in and for said State, Residing at Seattle, Wash.

Exhibit "A."

TO DAWSON CITY THIS YEAR!

The S. S. "Bristol" to St. Michaels and Steamer "Eugene," St. Michaels to Dawson City Direct.

Monday, August 23.

Three-fourths of a ton of freight and Baggage free with passage.

FARE.—Seattle to Dawson City, $300.

C. W. GOULD, Agent, 619 First Av., Seattle.

Exhibit "B."

EUGENE FOR DAWSON CITY.

The "Bristol" will take the "Eugene" to St. Michaels.

The "Bristol" left Comox yesterday morning after taking on a cargo of coal. She will leave Seattle August 23 for St. Michael's having in tow the "Eugene." Arriving at the mouth of the Yukon, passengers and freight will be transferred to the "Eugene," which will at once hasten up the river, and, being a fast boat, is ex-

pected to reach Dawson City by September 15. She will remain all winter, and will be utilized as a hotel. The Yukon does not begin to freeze until October 1, and then only at the mouth, so that there will be ample time for passengers to prepare for the winter before the ice forms in the upper waters.

The passengers will travel on the "Bristol" to St. Michael's. She has room for 1,000 passengers, but will only carry about 350, that being the capacity of the river boat.

She ought to reach St. Michael's September 3. She has been thoroughly everhauled, and is one of the finest boats to leave this port. The entire trip will be under the direction of Capt. Lewis, who is familiar with the northern waters and Yukon river, having been in the service for fifteen years.

Passengers are being booked at Portland, Seattle, and Victoria, and Davidge & Co., who conduct the service, have opened an office at 619 First avenue. The fare is $300 for the entire trip, and each passenger is allowed to carry 1,500 pounds of baggage free.

[Endorsed]: Amended libel. Filed Oct. 23, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

Monition and Attachment for Libel.

District of Washington, ss.

The President of the United States of America, to the Marshal of the United States for the District of Washington, Greeting:

Whereas, a libel hath been filed in the United States District Court for the District of Washington, on the 18th day of September, in the year of our Lord, one thousand eight hun- [Seal] dred and 97, by Gaston Jacobi and Charles Ruff,against

the steamship "Eugene" and the Portland and Alaska Trading and Transportation Company, and all others whom it may concern, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said steamship, etc., or vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said steamship, etc., or vessel, her tackle, etc., may for the causes in the said libel mentioned be condemned and sold to pay the demands of the libelants.

You are therefore hereby commanded to attach the said steamship, etc., or vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held in and for the Northern Division of the District of Washington, on the 7th day of October, A. D., 1897, at ten o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness, the Hon. C. H. HANFORD, Judge of said court, at the city of Seattle, in the Northern Division of the District of Washington, this 18th day of September, in the year of our Lord one thousand eight hundred and 97, and of our Independence the one hundred and 22d.

R. M. HOPKINS, Clerk,

By H. M. WALTHEW, Deputy Clerk.

JAS J. EASLY,

Proctor for Libelant.

Office of U. S. Marshal,
District of Washington. } ss.

In obedience to the within monition, I attached the steamer "Eugene," therein described, on the 18th day of September, and have given due notice to all persons claiming the same that this Court will, on the 7th day of October (if that day should be a day of jurisdiction ;if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

Date: Oct. 25, 1897.

C. W. IDE,
U. S. Marshal,
By J. H. McLAUGHLIN,
Deputy Marshal.

Marshal's Fees and Expenses:

	Dollars. Cents.
For serving attachment and monition	2.00
Miles traveled, 6, at 6 cents per mile.............	.36
Preparing copy of notice of seizure for publisher	.30
Publishing notice of seizure	4.00
Posting notice of seizure	.50
Keeper's fees, 38 day s, at $2.50 per day	95.00

AFFIDAVIT OF PUBLICATION

State of Washington,
County of King, } ss.

H. Daniells, being sworn, says he is foreman of the "Seattle Times," a daily newspaper printed and published at Seattle, King County, State of Washington; that it

is a newspaper of general circulation in said county and State, and that the annexed was published in said newspaper, and not in a supplement thereof, and is atrue copy of the notice as it was published in the regular and entire issue of said paper for a period of two consecutive days, commencing o nthe 23d day of September, 1897, and ending on the 24th day of September, 1897, and that said newspaper was regularly distributed to its subscribers during all of said period.

H. DANIELLS.

Subscribed and sworn to before me this 25th day of Sept., 1897.

[Notarial Seal] C. A. HUGHES.

Notary Public in and for the State of Washington, Residing at Seattle.

Printer's Charges, $4.00.

The United States of America, }
District of Washington. }

Whereas, on the 18th day of September, 1897, Gaston Jacobi and Chas. Ruff filed a libel in the District Court of the United States for the District of Washington, against the steamer "Eugene," her boats, tackle, apparel. and furniture, in a cause of breach of contract, civil and maritime.

And whereas, by virtue of process in due form of law, to me directed, returnable on the 7th day of October, 1897, I have seized and taken the said steamer "Eugene" and have her in my custody:

Notice is hereby given, that a District Court will be held in the United States courtroom in the city of Seattle, on the 7th day of October, 1897, at 10 o'clock in forenoon of said day, for the trial of said premises, and the owner or owners, and all persons who may have or claim any interest, are hereby cited to be and appear at the

time and place aforesaid, to show cause, if any they have why a final decree should not pass as prayed.

J. H. McLAUGHLIN,
Deputy U. S. Marshal.

[Endorsed]: Monition and attachment. Filed Oct. 25, 1897. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

Monition and Attachment.

District of Washington, ss.

The President of the United States of America to the Marshal of the United States for the District of Washington, Greeting:

[Seal]

Whereas, an intervening libel hath been filed in the United States District Court for the District of Washington, on the 20th day of September, in the year of our Lord, one thousand eight hundred and 97, by C. Hennigar, in case of Gaston Jacobi et al. against the steamer "Eugene," her tackle, apparel, etc., for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said steamer or vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said steamer, or vessel, her tackle, etc., may for the causes in the said libel mentioned be condemned and sold to pay the demands of the libelant.

You are therefore hereby commanded to attach the said steamer or vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything

to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court to be held in and for the Northern Division of the District of Washington on the 7th day of October, A. D. 1897, at ten o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness, the Hon. C. H. HANFORD, Judge of said court, at the city of Seattle, in the Northern Division of the District of Washington, this 20th day of September, in the year of our Lord one thousand eight hundred and 97, and of our Independence the one hundred and 22d.

R. M. HOPKINS, Clerk,
By H. M. Walthew, Deputy Clerk.

FRED H. PETERSON,
Proctor for Libelant.

Office of U. S. Marshal, }
District of Washington. } ss.

In obedience to the within monition, I attached the steamer "Eugene" therein described, on the 20th day of September, and have given due notice to all persons claiming the same that this Court will, on the 7th day of October (if that day should be a day of jurisdiction ;if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same. And that on the day of 189—, I released the said vessel upon receiving a no-

tice of bonding, signed by the clerk of the U. S. District Court.

Dated Oct. 7th, 1897.

C. W. IDE,
U. S. Marshal,
By J. H. McLAUGHLIN,
Deputy Marshal.

Marshal's Fees and Expenses:

For serving attachment and monition 2.00
Miles traveled, 6, at 6 cents per mile .... .36

[Endorsed]: Monition and attachment. Filed Oct. 25, 1897. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy Clerk.

United States District Court for the District of Washington.

GASTON JACOBI, et al.,
Libelants
vs.
THE STEAMER "EUGENE."
C. HENNIGAR, Intervening Libelant.

No. 1,128.

Præcipe for Dismissal of Intervening Libel.

To the Clerk of the above-entitled court:

You will please dismiss said intervening libel of C. Hennigar.

FRED H. PETERSON,
Attorney for Intervening Libelant, Hennigar.

[Endorsed]: Praecipe—Dismissal. Filed Oct. 25, 1897. R. M. Hopkins, Clerk.

In the District Court of the United States for the District of Washington, Northern Division.

GASTON JACOBI AND CHARLES RUFF,
Libelants.

vs.

THE STEAMSHIP "EUGENE" et al.,
Respondents.

YUKON TRANSPORTATION COMPANY,
Claimant.

Deposition Charles Ruff Taken in Behalf of the Libelants Herein.

Deposition of Charles Ruff.

Deposition of witness Charles Ruff, taken in behalf of the libelants herein, pursuant to an agreement hereto attached, marked Exhibit "A," and made a part hereof, said deposition being taken pursuant to said agreement at the office of Strudwick & Peters, in the Bailey Building, Seattle, Washington, on the 2d day of November, 1897, said libelants being present in person, and also by their attorney John C. Hogan, and the claimant, Joel P. Geer, by attorneys and proctors, Strudwick & Peters.

Whereupon it is agreed by and between the parties and attorneys here present that the deposition of Charles Ruff, a witness produced on behalf of the libelants, may be at this time taken; that the said witness may be sworn in the cause by George F. Fay, a notary public, and that said testimony may be taken down in shorthand and afterwards transcribed by Sara E. Amidon, and that the same so taken can be used in evidence on the trial in this cause, or any other proceeding therein, in the same manner as if regularly taken by the master of

this court and referees, the claimant hereby waiving all objection as to the manner of taking the testimony, but not waiving objections as to irrelevancy, materiality, competency and the like.

Whereupon libelants produce CHARLES RUFF, a witness in their behalf, and being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, testified as follows:

Examination in chief by JOHN C. HOGAN.

Q. You were one of the libelants in this action, Mr. Ruff? A. Yes, sir.

Q. What is your age? A. Forty-two.

Q. Where do you reside? Where did you reside before coming here? A. Dubuque, Iowa.

Q. When did you come to the State of Washington?

A. The beginning of August, 1897?

Q. What was your purpose in coming here?

A. My purpose was to try and get to the Alaska gold fields—Dawson City.

Q. I will ask you whether or not you engaged passage with the conveyance of yourself and baggage from this city to Dawson City.

(Claimants object to form of question, as leading.)

A. That is—I arranged for passage after arriving here—yes, sir.

Q. When?

A. Around the 18th of August—somewhere near the 18th of August.

Q. Now, how did you come to engage passage?

A. Well I saw these posters passed around the city—

Q. What posters?

A. Posters stating that the Portland and Alaska Transportation Company, or some name like that, were selling passages to Dawson City on the steamer "Eugene" and "Briston" from the city of Seattle.

(Claimant objects to question, and asks to have answer stricken out, on the ground that there is no connection shown—no responsibility shown on the part of the masters or owners of the "Eugene" for these posters.)

Q. Now, you may state what you did with reference to engaging passage to Dawson City from the start—

A. That is from the time I bought the ticket or was starting to buy my passage? Well, I decided to go by that way, that is, by the Portland and Alaska Transportation Company. They offered through the newspapers and poster around the city that they would take me, give me passage to Dawson City for the sum of $300. That was to be all that I was to pay for the trip. I was to have three-fourths of a ton of baggage free. That baggage, or outfit, as we called it, was bought at the stores here, and they delivered it at the wharf in care of the Portland Company.

(Claimant objects to all of this testimony unless witness shows who he means by "they.")

A. The Portland and Alaska Transportation Company. The "Eugene," I suppose.

Q. State whether or not you entered into a contract with any persons with reference to the conveyance of yourself and your baggage from this city to Dawson City in the North West Territory, and if so with what person. A. Yes, sir.

Q. With whom?

A. With the Portland and Alaska Transportation Company—at the office, Mr. Gould's office, on First Avenue.

(Claimant objects to that answer as being hearsay and a conclusion of law, and as to the competency.)

Cross-Examination.

By Mr. PETERS:

Q. Was your said contract in writing?

A. Well—I had only my ticket in writing.

Q. The only contract you had which was in writing was your ticket? A. Yes, sir.

Q. Then the ticket was in writing or in printing?

A. Yes, sir.

(Claimant objects to any other testimony than that showed by the writing mentioned.)

Direct, by Mr. HOGAN:

Q. At what place did you arrange passage?

A. At the office of Mr. Gould, on First avenue, No. —-

Q. On what date was that?

A. Around the 18th of August.

Q. Who was present there at that time?

A. Well Mr. McGuire—W. W. ———

Q. Well, did you pay any money at that time, and if so for what purpose?

A. Yes, sir, I paid $300 for my passage to Dawson City, for all of my expenses there.

Q. State what transportation rights that was, to give you what rights yourself, your baggage, or anything of that sort.

(Objection by claimant on the ground that the contract is admitted to have been in writing; that should be produced and that alone.)

Q. Now, to clear up that point with reference to the writing, I will ask you what you got at that place in the way of a writing.

A. Well, I got a ticket—a passage to take me and my baggage to Dawson City.

Q. What did you do with your ticket?

A. That was turned over to certain people Davidge & Co., at Victoria.

Q. Have you ever seen it since?

A. No, sir, it has not been in my possession since. It is in their possession over there now.

Q. State what, if anything, was stated to you with reference to the manner of making the trip by these two boats, and as to the time of arrival at Dawson City, Alaska. Give a brief statement of what was said to you.

(Claimant objects to question on the ground that all such provisions appear in the ticket. It is the best evidence of these facts.)

A. Well, the evening we left here, the 23d, after my passage was bought for $300 in one lump, I met Mr. McGuire, and we had a talk about the trip, and he told me to have all my freight sent to the Yesler Wharf, or one of the wharves—I think it was the Yesler—and to mark all the packages "Steamship 'Eugene,' Dawson City," with my name on it, and that after it had gone to the wharf I would have nothing to do with the freight any more. Well, in a few days we took a trip on the steamer "Seattle" to Victoria; it was in the night. We left here about 10 or 11 o'clock, and we were getting ready to find out where we were going to sleep there, and Mr. McGuire came up and he said that he had beds for all the passengers as were to go on the "Eugene." That is, we would not have to pay for our berths; that he had secured all of us berths and paid for them himself, and we did not have to trouble ourselves any further about anything at all, but just to take and keep on riding until we got to Dawson City.

Q. Now, I will ask you who was this Mr. McGuire, and what, if any, relation did he bear to the Portland and Alaska Transportation Company.

A. He was the president of the Portland and Alaska Transportation Company. I do not know his initials. He is not W. W.; he is the oldest brother out here in the city. There are three brothers; one is somewhere else.

Q. Where did you first see Mr. McGuire?

A. I saw him on the street and he talked with me about going to Alaska.

Q. You first saw him (Mr. McGuire) on the street about buying your ticket on the Eugene from him?

A. Yes, sir.

Q. State whether or not he was not the man in Gould's office when you bought the ticket.

A. No, sir.

Q. Who was that? A. W. W. McGuire.

Q. What relation does he bear to the Portland and Alaska Transportation Company?

A. I understand he is the treasurer. That is it was stated in the papers that he was.

Q. You saw Mr. McGuire on the street after buying your ticket? A. Yes, sir.

Q. About how long after buying your ticket?

A. I had met the gentleman before that I was introduced to him by a man who was trying to sell me the ticket; he was getting a commission, I suppose. I do not know his name.

Q. After buying your ticket you met him again?

A. I met him.

Q. About how long after?

A. Well, I should judge about the 19th or 20th of August. It was around about the 19th or 20th.

Q. At that time you had that conversation with him that you have already testified to?

A. Yes, sir. I can further state that I had not seen my baggage or outfit since I sent it to the wharf.

Q. Now, relying on that conversation with McGuire, the president, what did you do with reference to your baggage or the shipment of it?

(Claimant objects to the putting in witness' mouth the statement "relying on that conversation.")

Q. After that conversation what, if anything, did you do?

A. Well, after the ticket was bought I was in the hands of this company.

Q. I want you to give a detailed account of what you did after that conversation.

A. Well, in passing through a foreign country you have got to get out what they call a manifest. I had to get that out and have the manifests made out properly. I took that down to the wharf—

Q. State whether or not you delivered any goods to the wharves or not.

A. I delivered the goods.

Q. What were the goods, and where were they to go?

A. They were my miner's outfit and they were to go to Dawson City. They consisted of food, clothing, tent, and everything like that.

Q. Now, then, the next time after this that you saw McGuire where was that? A. At Victoria.

Q. After meeting him the first time on the street here?

A. On board the ship—on the steamer "City of Seattle," at Seattle.

Q. How far was that from the wharf where he told you to deliver your goods? A. The same wharf.

Q. Were the goods there at the same time?

A. I don't know. I had placed them in the hands of the company, and they were to take care of them.

Q. Did you have any talk with McGuire with reference to the goods? A. Yes, sir.

Q. What was that talk?

A. He stated that the goods were now in his charge, and from now on we did not need to bother ourselves about anything; that all we had to do was to take and ride until we got to Dawson City, Alaska.

Q. Then it seems you took the "City of Seattle" from here to Victoria? A. Yes, sir.

A. Yes, sir.

Q. When did you leave here?

A. The evening of the 23d of August.

Q. Was that the day you had this conversation with Mr. McGuire about the goods being in his possession?

A. It was that evening.

Q. Were there any other passengers aboard at that time who had engaged passage on this same expedition?

A. Yes, sir, I should judge there were forty.

Q. What was Mr. McGuire's business on that boat, the "City of Seattle"?

(Claimant objects to form of question, as being entirely hearsay, without showing some connection between Mr. McGuire and the defendant, who is intended to be sued.)

By Mr. HOGAN.—We propose to show the relation of Mr. McGuire to the Portland and Alaska Transportation Company, and relation of that company to the steamship "Eugene."

By Mr. PETERS, Claimant's Attorney.—It will be understood, then, that our exceptions are reserved conditioned upon such showing, with the right to move to strike out the testimony in that event.

A. His business was the same as he stated, was to see us start on our journey right, and at the same time to take charge of expedition. He was in the forward part of the ship in the cabin, with a slip of paper in his hand with the names of us passengers, and was giving out berths that he had engaged for us passengers, so that we would not have to pay any money for the use of the berths.

Q. That is, I understand yourself and your goods were transported from this city to the city of Victoria on board of this vessel, the "City of Seattle"?

A. Well, I turned over my goods to the Portland and Alaska Transportation Company and that is all I

could do. I placed my faith in these people as business people, and I calculated that they knew their business and that was the way of it. I was not bothering myself about them as they had taken charge of my goods. I went on the steamer "City of Seattle."

Q. Who paid for the conveyance of yourself and your goods on this trip from here to Victoria, on the "City of Seattle"?

A. Well, the goods was paid for by somebody, not by myself; my fare, the Portland and Alaska Transportation Company paid for it. The same as I have already stated, I turned over all my freight to these people at the wharf, and that settled it as far as I was concerned. I thought they were business people and would attend to it as they agreed.

(Claimant objects to witness answering question given outside of a response. Mr. Hogan hands witness a slip of paper and asks him if that was one of the posters that he had testified about which were circulated on the streets of Seattle.)

A. Yes, sir. Those are the bills that were passed around.

By Mr. HOGAN.—We offer identification in evidence, now. (Paper marked "Identification A.")

(Claimant objects on the ground of incompetency, no connection being shown, no responsibility for it on the part of the defendant.)

Q. Now, were there any other printed bills other than those? A. Yes, sir.

Q. Have you any other? A. No, sir.

By Mr. PETERS.—Where did you see those other bills?

A. Circulated around the streets and in front of the office of Gould.

Q. Is that where you bought your ticket?

A. Yes, sir. On First avenue, in this city.

Q. Did you read that bill? A. Yes, sir.

Q. Have you made any inquiries or search to find that bill, or a bill like it?

A. Yes, sir; but I can give you an idea of its contents.

Q. Where did you inquire?

A. Well, I inquired this town over about it.

Q. Have you been able to find that bill?

A. No, sir.

Q. Did it relate to this subject? A. Yes, sir.

Q. I will ask you what was the substance of that bill.

(Claimant objects to the evidence as incompetent, this being an attempt to show the substance of printed circular without proper foundation. That is secondary evidence.)

A. Well, of course I cannot read you fully out just the way it read. It was to Dawson City this year. Steamer "Eugene" and "Bristol" leaves here on or about the 23d day of August. It named the agents there on the bottom of that. I know Gould name was there, but I do not know his initials.

Q. State whether or you saw any advertisements in the newspapers here about that time with reference to this subject. A. Yes, sir.

(Claimant objects on the same grounds as to incompetency as before.)

Q. Now, returning again to the time you were on board the "City of Seattle" from this place to Victoria. What time did you arrive at Victoria?

A. About 8 o'clock August 24, 1897, in the morning.

Q. Was McGuire present there during the whole journey?

A. He made the journey to Victoria with us men in charge?

Q. Which one, the president of the company?

A. Yes, sir, the president of the company.

Q. Well, in what manner were you to continue the

journey further? What was said between McGuire and you? Go on and tell about it.

A. Well, we landed at Victoria, found there was no boat there, so we went up to the city. They said that the boat would be here in a few days, and went to the "Queen's Hotel"—that is, most of us—and while sitting outside of the hotel Mr. McGuire, the president of the company, he came along and he told us that he was going to leave us there that next morning, but that he would have Mr. McFarland, the manager of the company, over, and that he would continue the journey with us where he left off on the same; he says that we should not bother our heads about anything, but just keep right on riding until we got there.

Q. What did he mention, anything?

A. He said that everything would be all right, and that the company would take charge of us; that he was representing the company. He said that he would pay our board while we were at Victoria.

Q. Was anything said about your outfit?

A. Well, it was the supposition that they were taking care of it.

(Claimant asks to have that stricken out.)

Q. What did he say about your baggage, if anything?

A. Well, we had an argument over there about baggage on account of what charge was to be made, whether by ship measurement instead of the actual weight of the goods. They wanted to charge us ship measurement. Afterwards, Mr. McGuire told us that the baggage would go as the actual weight, whatever that would be; that was the way we would get our freight up there; that he would attend to it, but if we had over 1,500 pounds, we would have to pay excess of baggage on anything over. Fifteen hundred pounds was given as three-fourths of a ton, and that he would be responsible for that, and that he had taken it in his own hands to take

care of that part of it.

Q. Where and in whose possession and control was the baggage at that time?

A. Well, the same as Mr. McGuire said he would take care of the baggage, and would see that it would go by weight instead of measurement; that he would attend to those matters as the manager of the concern; that McFarland took charge of us after we left Seattle, and he paid my expenses there.

Q. Who paid your expenses there?

A. Mr. McFarland.

Q. What were those expenses?

A. They consisted of board and lodging.

Q. How long were you there?

A. We lodged there from morning of 24th of August until August 31, is when we left.

Q. State whether or not Mr. McFarland was there during that time.

A. He was there after the 25th.

Q. What were you waiting for at that time?

A. The steamship "Eugene."

Q. Who assumed all expenses?

A. The Portland and Alaska Transportation Company. Mr. McFarland said that he would pay anything that run up to not more than $1.25 per day, and that every one should be satisfied with that; that if anyone went above $1.25 he would not pay more.

Q. Where was your baggage while you were waiting in Victoria?

A. I don't know. I suppose it was there. They had it in charge.

(Claimant objects to all this kind of answer in the first place as being wholly irresponsive to the question, and in the second place as being wholly immaterial, irrelevant, and impertinent.)

Q. Did the boats afterwards arrive?

A. Yes, sir.

Q. When? A. On the 29th of August.

Q. What boats were they?

A. The steamship "Bristol" and "Eugene."

Q. Now, state whether you were on board of these vessels or either of them.

A. The night of the 30th we went aboard the "Bristol."

Q. At whose direction?

A. At the direction of Mr. McFarland.

Q. How many passengers were there at that time?

A. Ninety-five passengers.

Q. What did you get aboard of the "Bristol" for?

A. To journey to Dawson City.

Q. Where was the "Eugene" at that time?

A. The "Eugene," the morning of the 31st, came alongside of the "Bristol" at Victoria.

Q. Then what did you do farther with reference to continuing the voyage?

A. Well, we took our clothes—that is, all we took care of—and the outfits were put on—

Q. Who had charge of them?

A. The same people that had charge of them here, the Portland and Alaska Transportation Company.

Q. Then these vessels put off on that voyage to St. Michaels, did they, on the way to Dawson City?

A. Yes, sir.

Q. Well, state whether or not the "Eugene" was in tow of the "Bristol."

(Claimant objects to both the preceding questions as leading, viz., "that both these vessels put off on that voyage," and also the last question as leading.)

Q. Now, I will ask you to state, Mr. Ruff, what these vessels did with reference to undertaking this voyage to Dawson City.

A. Well, we got on the steamer "Bristol," part of the expedition on the 30th of August.

Q. And where was the "Eugene" at that time?

A. I don't know where she was then; we sighted her next morning.

Q. Before you got on the "Bristol" where was the "Eugene"?

A. The "Eugene" was at Port Townsend.

Q. And where did you see her first?

A. We saw her first at Victoria.

Q. About how long after you got on board the "Bristol"?

A. I suppose we sighted the boat about half an hour before she came to the ship; she came alongside of the "Bristol."

Q. Now, go on and tell about that.

A. The "Eugene" came alongside of the "Bristol." From where we could see I could not tell whether she was fastened to the "Bristol." She stayed there about 10 minutes—about that, I think—and then steamed away, and half an hour after the "Eugene" steamed away the "Bristol" started after her. After we got about six miles or so up the river or up the ocean we met the "Eugene," and the sailors threw out a line and made fast to the "Eugene," and from that time we towed the "Eugene" until we got to Comox or ————, as some call it, on Vancouver's Island.

Q. How far is that from Victoria?

A. I suppose it is about 165 miles, from what they told me.

Q. Go on and tell what you did there.

A. Well, we landed there for coal. The next day, or the second day—we were there three days—the "Eugene" began to unload part of her freight on to the steamship "Bristol." They were exchanging freight back and forth or doing something. I know they were unloading freight between the two boats, and—

Q. What was that freight?

A. That was the outfits of the passengers. Mine may have been among those changed, I do not know—

Q. What farther was done there?

A. Well, they worked about three hours taking that freight out, and changing from one boat to the other, and the next day, after that freight was changed, they changed some more freight. The "Eugene" was seized the same day by the British government, the second day of our stay. The third day of our stay the "Eugene" broke loose from the custom officers and steamed up the ocean towards Queen Charlotte's Sound. The next day, at 8 o'clock, the "Bristol" steamed off after the "Eugene"; afterwards we took the "Eugene" in tow, and we towed the "Eugene" all that day and night, and until around 3 or 4 o'clock the next afternoon; we landed back to a little fishing village called Elert Bay. We stopped there about thirty-six hours.

Q. State what took place there.

A. While stopping there there was another exchange of freight, and afterwards the two boats were tied up together and made fast.

Q. What was exchanged there?

A. All miners' outfits and such as that.

Q. Was yours among them?

A. Mine was among them just the same as all the rest of them. There was the outfits of 95 men, and mine was on one or the other ship.

Q. Well, go on; then, what next.

A. Well, we stayed there until the next day. You want me to say what we requested the captain to do?

Q. Tell what was done while at Elert Bay.

A. Well, we landed at Elert Bay. We went back there by the request of Captain Lewis, the captain of the "Eugene," and the steamer "Bristol" turned on account of his request to take the "Eugene" to the nearest port; that was when we got to—

Q. Why did you go back?

A. Captain Lewis stated that he wanted a survey of his boat made to find out the condition his boat was in, to see whether she was seaworthy or not.

Q. Go on and tell what was done.

A. Well, there was a committee of men appointed, one officer of the "Bristol," one or two of the "Eugene," and two men from the passengers; they went to work and investigated the hull of the "Eugene" and reported that the condition—

(Claimant objects to report as hearsay.)

Q. State what that report was.

A. They reported the condition of the steamer "Eugene" that she was not seaworthy, and that it was necessary to have some work done on her before they could proceed further.

Q. Was that report oral?

A. It was a written report, but the papers I can't produce, but this is what was reported to us by the committee.

Q. Did you see the report?

A. Yes, sir.

Q. You saw the committee that made the report and heard them talk about it?

A. I was one.

Q. Did Captain Lewis make a report?

A. Yes, sir.

Q. What was his report?

A. He made the same report as the rest.

Q. What did he say—

A. He joined in the written report. He was one of the officers who went down and examined the hull of the boat.

(Claimant objects to any testimony as to the contents of that report as incompetent.)

Q. Do you know where that report is?

A. Our chairman is some place in Alaska and he has got the papers with him. I made a special trip to Victoria to get the papers and they told me that he had taken everything with him.

Q. Where is he now?

A. He is supposed to be around Circle City, but if he is like all the rest of the miners he did not get there.

Q. State whether or not Captain Lewis of the "Eugene" made any statement to the passengers generally or publicly at any meeting of the condition of the boat, or at any time.

(Claimant makes the same objection here as to competency of any statement of Captain Lewis to bind these claimants.)

Q. I will ask you if Mr. McFarland, the agent, was present there at that time.

A. He was present when the committee came up from the hull of the boat and Captain Lewis went up to him and told him of the condition of the boat.

Q. And now I will ask you what Captain Lewis stated.

A. He stated that the "Eugene" was in a bad condition and was not fit to go out to sea unless she was repaired.

Q. Was McFarland present at that time?

A. Well, they were all requested to come up there: there was a lot of men; I suppose he was among them.

Q. He was on the boat, was he?

A. He was on one of the boats.

Q. What boat was this on?

A. The meeting was held on the "Bristol," with the "Eugene" alongside of her.

Q. What did Captain Lewis say?

A. He stated that the "Eugene" was not in a condition fit to go to sea, and stated at the same time, in the presence of McFarland, that there were five knees bro-

ken on one side of the boat and two on the other, and he considered it a pretty dangerous proceeding to go any farther with it, and Mr. McFarland began to laugh and said that those knees were broken two years before that.

Q. Well, then, did Captain Lewis refuse to go farther with his boat?

A. He said that if the "Bristol" and "Eugene" went on that every one of the men on the "Eugene" would get off and get into the "Bristol"; that they would not stay on the "Eugene" any longer—

(Claimant objects to witness' voluntary testimony.)

Q. I will ask you if you were on board the "Eugene" at any time.

A. Yes, sir, at different times.

Q. When?

A. At Comox two or three times, and Elert Bay.

Q. Were any of the other passengers on board of her?

A. Yes, sir, any amount of them.

Q. When were they on?

A. I believe mostly after we landed at Elert Bay. I know that two or three times we all went in there to examine the condition of the boat.

Q. Was there any meeting held of the passengers?

A. We had a meeting of the passengers.

Q. What was the purpose of that meeting?

A. Well, we were to hold a meeting, but the did not come; we were then invited to come down into the hold of the ship "Bristol," with Mr. McFarland and Captain McIntyre. They wished to submit a proposition to us, and invited all to come down to hear what they had to say, and Captain Lewis stated there that it was impossible for us to go any further, that is, to go to the Yukon river with the "Eugene," and stated that he had been on that coast for years, and he said there was no wood and no timber to build houses, and he said if we were to live in our tents this winter up there without fuel

that he considered that two-thirds of us men would not live until spring. Captain Lewis stated that the "Eugene" could not go to sea without repairs, and that it was not safe for us to go on without her—

Q. What did you do then?

A. We came back to Victoria.

Q. How did you come back?

A. I went back on the "Bristol" with the "Eugene" in tow.

Q. What was the reason of your coming back?

A. The reason was that by not having the "Eugene" in such a condition that she could not go to Alaska, that we could not go. If we had gone there without the "Eugene," and been dumped off like sheep, we would not have been able to live until spring, according to the statement of Captain Lewis, who had been in Alaska.

Cross-Examination.

By Mr. PETERS.—Q. Mr. Ruff, you say you are from Dubuque, Iowa? A. Yes, sir.

Q. Had you ever been in this country prior to August last? A. No, sir.

Q. You did not engage your passage then for Dawson City until the 18th of August? A. No, sir.

Q. Where were you in the meantime?

A. In this city.

Q. You made various inquiries, did you not?

A. Yes, sir.

Q. And the inquiries which you made led up to your making application for this passage?

A. Yes, sir.

Q. Now, whom are some of the people whom you made inquiries of?

A. N. H. Thedinga & Co., 914 First avenue, a hard-

ware dealer, and a man who was trying to get me to buy the ticket.

Q. Now, the man that was trying to sell you the ticket was getting a commission, was he not?

A. I don't know.

Q. You supposed he was.

A. I don't know anything about it.

Q. You so stated in your direct examination you knew that he was trying to sell you a ticket on commission. You believed so when you stated it so just now, did you not?

A. I don't know whether he was to get a commission or not.

Q. You believed that it was true that he was getting a commission just now?

A. I suppose that he was getting a commission.

Q. Then you think he was a ticket broker?

A. I suppose so.

Q. Now, as to Mr. Thedinga, you formed an acquaintance with him here for the first time?

A. No, I knew him in the east before.

Q. You have known him previous to that time. You had a good deal of confidence in him. You confided in him your plan of going on this voyage?

A. Yes, sir, if I wanted to go this year.

Q. And he approved of it and made some investigation about it?

A. Well, he advised me that was my best way to get there if I went this year.

Q. You relied as much on Mr. Thedinga's advice as on anyone's else?

A. He told me that the people were all right; that they were business people, and stated that if I bought a ticket of them they would do things in a business way.

Q. He thought you had better buy your ticket there?

A. Yes, sir.

Q. Then you went in on that understanding?

A. Yes, sir.

Q. Relying on Mr. Thedinga?

A. On the advice of him and the honesty of the people I was dealing with.

Q. Now, who was the man you paid the $300 to?

A. I paid it in the office of Mr. Gould.

Q. C. W. Gould?

A. No, I paid it to one of the officers there, and they give me ticket and everything right there.

Q. Do you know the man you paid the $300 to?

A. I do not know his name, but I know him when I see him. It was in Mr. Gould's office.

Q. Who told you it was Mr. Gould's office?

A. His advertisement was there.

Q. That is the only way you knew it was Gould's office, because you saw the advertisement there?

A. No, sir.

Q. Where is the office?

A. Down here on First avenue, near First National Bank—this side. The best I can describe it near Kline & Rosenberg's clothing store, a few doors south. I am a stranger here; that is the best I can tell.

Q. Now, you have mentioned two Mr. McGuires as agents of the Portland and Alaska Transportation Company? A. Yes, sir.

Q. Is it not a fact that your information in regard to their being agents of this company is based on other than their own statements to you?

A. No, sir.

Q. Did Mr. McGuire tell you he was the agent of this company?

A. Well, it was stated in the newspapers that he was.

Q. In which newspapers?

A. The newspapers of the city, that he was the agent of the company.

Q. Then that was the way you got the impression. In what newspapers?

A. I think in the "Post-Intelligencer," in some of your daily papers.

Q. Now, you stated, Mr. Ruff, that when you made out your manifests for your outfit and sent it down to the Yesler dock under the directions of Mr. McGuire, that when you had made such conveyance under Mr. McGuire's directions you paid no more attention to your outfit, having done this?

A. That is, if you will excuse me, I had my clothes and such things as that.

Q. But when you spoke of the transfer of freight and baggage between the "Bristol" and "Eugene" and "Seattle" you meant transfers of outfits?

A. I meant of outfits, groceries, hardware, and the like.

Q. Your clothing you kept with you on the "Bristol"?

A. Yes, sir.

Q. So that what you meant by stating that the "Bristol" and "Eugene" exchanged freight at Comox was transfer of these outfits from one boat to the other?

A. Yes, sir.

Q. As a matter of fact you never saw your outfit after you left the "City of Seattle"?

A. No, sir.

Q. When going on the boat "City of Seattle" did you learn who was the captain of that boat?

A. No, sir.

Q. Who was the manager of that boat?

A. I could not say.

Q. What company owned that ship?

A. I cannot say.

Q. Were there other passengers? A. Yes, sir.

Q. It was a boat on a regular run between here and Victoria, was it not. A. Yes, sir.

Q. A daily run? A. I don't know.

Q. Don't you know it runs daily?

A. I think it runs several times a week, daily except Sunday.

Q. Now, there were many other passengers on the "City of Seattle" on the trip with you besides those who afterwards went on the "Bristol"?

A. I cannot say as to that.

Q. Was the "City of Seattle" run especially for the accommodation of the passengers for the "Bristol"?

A. Not that I know of. The same as I say, I am a stranger.

Q. You know that it is a fact that the "City of Seattle" was on its regular run? A. I don't.

Q. You stated that it was a daily run?

A. No, sir.

Q. Mr. Ruff, did you not just say that it was a daily run except Sunday?

A. I said I thought it run between here and Victoria, and left here two or three times a week except Sundays. I know that it runs daily between these places.

Q. Did you not know that it was a daily run then?

A. No, I have found that out since.

Q. Have you been to Victoria since?

A. Yes, sir.

Q. Have you found out since who was the captain or the manager of the Seattle company?

A. No, sir, the "Seattle" now is out of that business.

Q. How is it, Mr. Ruff, that you know so much about the officers of the Portland and Alaska Transportation Company, and of the "Bristol" and "Eugene," and know nothing of the officers of the "City of Seattle"?

A. I had business with the officers of the Portland company.

Q. Is it not a fact that you learned all this since the suit was begun? A. No, sir.

Q. Do you mean to say that you have not made inquiries?

A. I have made inquiries, but I have been acquainted with Mr. McGuire and Mr. McFarland. I got acquainted with W. W. McGuire; I met him first on the street here in Seattle.

Q. Now, you have stated that Mr. McGuire stated to you that he had provided you men your berths on the steamer "City of Seattle," have you not?

A. Yes, sir.

Q. How about this Mr. McFarland? From what source did you learn that he was the manager of the Portland company?

A. Because he said so himself; that was my source of information.

Q. What time of day on the 30th of August did you leave Victoria. A. I did not leave on the 30th.

Q. When did you leave?

A. On the 31st, around 8 o'clock in the morning.

Q. At that time you think that the "Eugene" was at Port Townsend? A. I don't know.

Q. You stated that the steamer "Eugene" was at Port Townsend when you left Victoria on the "Bristol."

A. No, sir.

Q. What did you say?

A. I said that when the "Bristol" left Victoria the "Eugene" was about four or five miles ahead of us. When she left Victoria we steamed out a very short time after.

Q. Did you see her there. A. Yes, sir.

Q. Tell all about it.

A. I was standing on the wharf near the "Bristol." The platform of the wharf extends out of the low water.

Q. The ocean wharf?

A. The outer wharf. The "Bristol" was lying alongside of this wharf; the "Eugene," from where I stood, came along on the outside of the "Bristol" and she stay-

ed there maybe 10 minutes, and some of the parties had a conversation I suppose on this subject. Then the "Eugene" backed out and steamed off.

Q. It did not tie up, then?

A. I don't know; from where I stood she came on the outside of the "Bristol." She must have touched the "Bristol" from the position she was in. Of course I was standing here on the wharf and the "Bristol" over there (showing by gesture the relative positions). Then she went on up the ocean towards Comox.

Q. And how soon did you overtake her?

A. I should judge the "Eugene" made 4 or 5 miles, but I am not positive as I don't know much about distance on the water. We met the "Eugene" somewhere around there and took her in tow.

Q. Well, what was the reason for taking the boat in tow? A. Well, I don't know that.

Q. You did not inquire into that as particularly as you did other things.

A. I supposed that was the way they did; I know nothing about the ocean.

Q. Was she going? A. Yes, sir.

Q. When you went into Comox you went in with this boat in tow, and you went in to get coal?

A. Yes, sir.

Q. Did your boat take coal there or did the "Eugene"?

A. I don't think the "Eugene" did.

Q. You noticed this transfer of outfits from one boat to the other? A. Yes, sir.

Q. But you don't know whether the "Eugene" took on coal or not?

A. Well, now, I saw the men working there. I did not pay particular attention. I did not care about helping; I would watch awhile and then go away awhile, and then come back and watch.

Q. Then you don't know whether they took coal or not? A. I don't think they did.

Q. Is it not likely, Mr. Ruff, that the putting of coal on a boat would attract your attention?

A. Yes, sir.

Q. And did it attract your attention?

A. Yes, sir.

Q. Yet you don't know whether the steamer "Eugene" took on coal at Comox or not?

A. The "Eugene" was out and alongside of us all the time; she was there on the outside of the "Bristol" all the time. What she done at night I don't know.

Q. What time did you get to Comox?

A. I should judge 9 or 10 o'clock at night, and left there around 3 or 4 o'clock, and we were there—

Q. Which boat left first?

A. The "Eugene" left first. She steamed out ahead of us.

Q. Now, is it not a fact that no outfits were taken on the "Eugene" from the "Bristol"?

A. They were handling freight back and forth there, and that was the expedition that was going to Dawson City. I saw them handling outfits back and forth.

Q. You did not see your own there?

A. There were 95 of us going on that expedition, and I have no idea whether mine was transferred or not, but I suppose it was just the same as the others. There were outfits transferred from the "Eugene" to the "Bristol" and other outfits transferred from the "Bristol" to the "Eugene."

Q. You say you had an argument with this McFarland at Victoria in regard to the space to be allowed you for your baggage or the measurement there, whether you were to have ship measurement or weight of the goods?

A. Yes, sir.

Q. Now, then, was your baggage there with you on the "Bristol"? A. I cannot say.

Q. Where were your clothes and other baggage?

A. They was with me on the "Bristol."

Q. Where your outfit was you have already stated you could not tell? A. Yes, sir.

Q. Now, when you left Comox the steamer "Eugene" left before you, and the next time you saw her she was where?

A. It was Queen Charlotte's Sound we met her, somewhere in the sound. The next morning the sailors sighted her about the hour of 9 o'clock.

Q. Was she still under weigh?

A. She was waiting for us there.

Q. Anchored?

A. I can't say. They threw her a line and we made fast the boat again with a steel hawser and towed her.

Q. Then where did you go?

A. Then we went from where we met the "Eugene" and took her in charge for Dutch Harbor.

Q. And you went into Alert Bay?

A. Returned to Alert Bay.

Q. What sort of weather was it?

A. Rainy weather.

Q. Was it rough?

A. I cannot say it was rough on the water from Comox to Alert Bay.

Q. Could you tell whether it was or not?

A. Well, I don't consider it was rough because if it had been more of us would have been sick.

Q. Have you ever been to sea before?

A. No, sir.

Q. You are not used to traveling?

A. I have been around the country lots and on fresh water lakes, but not on the ocean before.

Q. You don't think it was rough, then, at all?

A. Not very; I should say it was not rough.

Q. Now, you say a number of the passengers went on

the steamer at Comox and at Alert Bay; was that simply out of curiosity? A. I was there myself.

Q. When was that, when she was tied alongside of the "Bristol"? A. Yes, sir.

Q. Afterwards you went over here as a committeeman at various times? A. Yes, sir.

Q. Who else was on that committee besides Captain Lewis?

A. I was not acting on that committee. I was on the committee that was appointed by the miners, what we called the miners' committee. The same as they have on all of these expeditions, a committee to run the affairs in a business way; that is, to look out for the miners. I was on that committee.

Q. And the committee of inspection was made up of what persons?

A. The same as I say, one of the officers of the "Bristol," Captain Lewis, and two or three more of the people in the miners' party.

Q. These people in the miners' party were not seamen, were they?

A. Two were captains—had been captains of vessels.

Q. They made the written report? A. Yes, sir.

Q. To whom did they present that report?

A. The report was not an official report; they just reported on the condition of the board on writing, and the report was to the purser, Johnson, of the "Bristol." They stated that if we requested to be returned to Victoria—that is, if the "Eugene" would not go, that was that as the captain decided not to go with the boat, it was out of the question to go there alone with the "Bristol." We then as a committee asked the captain to turn around and take us back to Victoria, or some port where the repairs could be made, and Captain McIntyre and Mr. McFarland stated that they would take us back under the conditions that we would sign certain papers,

and we asked him to make out his papers so we could see what it meant. We read the papers and put a protest stating that we would sign the paper, but it was under protest that we were compelled to do it.

Q. Then the paper will show just what the protest was? A. Yes, sir.

Q. Now, that paper was the release of the ship "Bristol"?

(Objected to as not best of evidence.)

A. It was supposed to be; that is, the release read that they wanted to go back to Victoria, but it was under protest.

Q. I will ask you what you understood it to be?

A. What I understood it to be was a release of the "Bristol" from any claims of damages on my part, but at the same time we had a protest written on it, and Mr. Johnson was willing to let us have it on.

Q. Now, then, when you turned around and went back to Victoria the "Eugene" stayed with you and she was made fast, and the purpose of going back to Victoria was to make repairs as the captain had stated?

A. No, sir.

Q. The Captain wanted to have the boat taken to some place where the necessary repairs could be made?

A. We turned back to Victoria on account of the "Eugene" not being in fit condition to go to St. Michaels as she was.

Q. Then, do I understand that you would not agree to go to St. Michaels after the boat was put in repairs?

A. No, sir.

Q. What do I understand you to mean?

A. The understanding was that we wanted to make some port. We requested to be taken to Victoria, as for Mr. McFarland it was impossible for him to keep his contract; that it was useless for us to go any farther without the "Eugene," as we could not live through the

winter without our outfits, and there was no fuel there. We could not get to Dawson City; we wanted to come back.

(Objected to by claimant.)

Q. Now, Mr. Ruff, Captain Lewis, of the "Eugene," told you that the "Eugene" was not fit to go any further unless there was repairs; he wanted to go back to some port where it could be repaired. Do I understand you that you meant that you were going back to Victoria for the purpose of having the "Eugene" repaired?

A. No, sir.

Q. You refused, then, to go on after they would get her repaired? A. No, sir.

Q. You refused to go in order to have the Eugene repaired? A. No, sir.

Q. Then what were you going back for?

A. Because we could not get any farther.

Q. Then you did not propose to get any further?

A. Yes, sir.

Q. You did not propose to get to Dawson City?

A. That was for those people to decide. When we went back to Victoria we still expected to get to Dawson City, but it was getting too late.

Q. What time did you get back to Victoria?

A. The 8th or 9th of September.

Q. Now, I understand you to say that you never traveled for any great distance on the water?

A. Yes, sir.

Q. Now, as to going on the "Eugene" at Alert Bay and at the last place, Comox, I understand that you went on simply out of curiosity?

A. The last place, at Alert Bay, it was just out of curiosity so far as I was concerned.

Q. Now, there are a number of your friends here who have similar tickets to the one you have obtained; are there any others here who were on the steamer "Bristol" with you? A. Yes, sir.

Q. Is there one in the room? Mr. Jacobi, for instance; you have seen him and talked with him in relation to this case?

A. Yes, sir. I don't know whether he has got the same ticket or not.

Q. You think, then, that Mr. Gould sold you the only ticket?

A. I bought my ticket from him.

Q. It was a printed form, did you say?

A. Part of it was printed and part writing.

Q. And is it not the same as Mr. Jacobi's ticket?

A. I saw the ticket from a distance, but not to tell in any way at all.

Q. You never endeavored to get from any of those others that ticket to be used in this case? Mr. Jacobi is here in the room with you, is he not? A. Yes, sir.

Redirect Examination.

By Mr. HOGAN.—Q. Now, beginning where Mr. Peters left off in regard to the tickets, I understood you to say in your direct examination that Gould gave you a written order of some sort? A. Yes, sir.

Q. Was that printed?

A. There was some print and some writing.

Q. Where did you present that?

A. At Victoria.

Q. What became of it?

A. That ticket was taken up and we got another ticket of D——— & Co.

Q. Returning to the time of the signing of this paper on board of the "Bristol" for the return of yourself and your baggage, you may give a statement how that came about.

A. About returning to Victoria? It was signed by the passengers on account of the "Eugene" or the state-

ments made by Captain Lewis and Mr. McFarland that it was impossible to proceed any farther with the "Eugene" this year; that it would be impossible for him to furnish any boat to go, or to repair the "Eugene" in time.

Q. Who was present when he stated that?

A. I guess the 95. I saw lots of faces. They were all present, I think.

Q. Was that a general statement made to the passengers?

A. That was the general statement made to the passengers and was so stated by the captain of the "Bristol" as to continuing of the journey what he would do.

(Objected to by claimant as not proper redirect examination.)

Q. What did he state?

A. He stated that he would continue his journey regardless of the "Eugene."

Q. And what would he do with the passengers?

A. He said that he would take the passengers right up to the Yukon, and if there was any boat to take them up, and unload them on the shore, and let them do what they could to get through to the country.

Q. What was done then?

A. He stated that to the committee, that if they wanted to go back to Victoria, that with Mr. McFarland's permission and the signatures of Mr. Johnson and the rest of the crew, and he would return to Victoria, or otherwise he would take us up to St. Michaels.

Q. And what did Captain Lewis say in response to the proposal of Captain McIntyre?

(Claimant objects to question as leading.)

A. Captain Lewis stated that if we went to the Yukon river this winter he says that there was no wood, there is no lumber, and if we are put off on that shore this winter two-thirds of us will die before spring from exposure and cold.

Q. Did Captain McIntyre say that he would take you back?

(Claimant objects to question as leading; also as not proper redirect examination.)

A. He said he would go on to St. Michaels unless we signed that paper.

Q. I will ask you if anything was stated by McFarland at that time with reference to the responsibility of his company and the "Eugene" if you did sign that paper.

(Claimant objects on the ground that it is not proper redirect examination, and on further ground of no connection having been shown between Mr. McFarland and the claimant.)

A. Mr. McFarland stated that if we signed the paper that he would sign it and be responsible for anything that would happen to it after we got back.

Q. Responsible to who?

A. To us passengers, on account of not being able to get us up to Dawson City.

Q. Was the "Eugene" mentioned at that time?

A. It was the Transportation Company; he represented the company.

Q. Did you say that you signed that paper?

A. Yes, sir.

Q. And signed it under protest? A. Yes, sir.

Q. And you were compelled to sign it by these circumstances. A. Yes, sir.

Q. Did McFarland sign it?

A. He signed it after we all signed it.

Q. You understood that to be a release to the owners of the "Bristol"? A. Yes, sir.

Q. Now, as to another matter. There has been some suggestion here as to McFarland and Lewis of the "Eugene" desiring time to repair their boat and continue the journey.

A. No such proposal was made by them that said they wanted to get to the nearest port. They decided they could not do anything this year. Mr. McFarland in words said that he could not carry out his contract this year.

Q. Now, in case you had gone on to St. Michaels, were you in any way equipped to pass the winter?

A. Yes, sir.

Q. Were you provided for and provisioned with reasonable safety.

(Claimant objects to repeated question, the witness having definitely answered the question.)

A. As far as equipment, clothing and food were concerned we were in good shape, but not in fuel and such as that.

Q. How about shelter?

A. We had nothing, the same as I stated we had nothing; that is Lewis' own statement.

By Mr. HOGAN.—I now wish to examine the witness with reference to the damages he sustained as alleged in his libel, at this time having overlooked it in the examination in chief.

Q. Now, by reason of the failure of this Transportation Company to keep its agreement to take you to Dawson City, I will ask you whether or not you suffered any damages or loss, and if so, how much, and in what nature.

(Claimant objects to question as leading and as calling for a conclusion of law.)

A. I suffered loss in this way, I suffered loss in not getting up there and getting to work at mining.

(Claimant objects to any testimony of any damages, or any measure of damages as wholly incompetent, except as to the passage money paid.)

Q. About how much did you pay for your outfit?

A. I paid for my outfit—it amounted along about $170 or $180.

By Mr. PETERS.—It is understood that the objections of the claimant are repeated to each item of damages.

Q. State how much damage you suffer.

A. Well, I figured on going up there and doing blacksmithing this winter, and I figured that my time was worth at least $15 per day up there. By having provisions enough along to keep me a year I should be able to make that amount of money every day.

Q. How much time did you lose?

A. I lost from September 15—I suppose that was the time they promised to land us up there—and until now, and from now on until spring.

Q. Have you done anything in the line of work?

A. No, sir.

Q. Have you been able to get work, have you tried?

A. Yes, sir, but I could get none.

Q. What is your time worth since the date they undertook to deliver you at Dawson City until the present time?

A. That was the 15th of September. Fully seven or eight hundred dollars.

Q. How much, if anything, did you lose on your outfit in value?

A. I had to sell my outfit since I came back here. I lost on the outfit about $50, between $40 and $50.

Q. Does that include any charges you had to pay?

A. The charges are outside of that.

Q. What charges were there?

A. There were the charges here, and from Victoria here, drayage, etc. I paid charges in removing my outfit and getting it back to here fully $8.00.

Q. How much did you lose by reason of the failure of the Transportation Company to land you up there?

A. I have lost from the time we left here, the 23d of August, until this date.

Q. Was your time during that interval worth anything? A. Yes, sir.

Q. How much?

A. I considered it worth, as I stated, $15 a day to me.

Q. What is your business?

A. It is a mechanic and machinist.

Q. How long have you worked at that business?

A. About twenty-seven years.

Q. I will ask you for about how long you were prevented from carrying on that business by reason of this expedition failing to get to Dawson City?

A. I have been prevented—well, if I had not started here on my trip I would have left here. I have been prevented from the time I started on my trip.

Q. How much can you earn at your business?

A. On an average $2.90 per day.

By Mr. PETERS, Claimant's Attorney—We move to strike all of this line of examination, repeating our objections as to incompetency and immateriality.

Cross-Examination.

By Mr. PETERS.—Q. Now you say that you lost $15 per day to the amount of seven or eight hundred dollars; that you expected by what you understood that a mechanic of your ability would get $15 per day in Dawson City, that is what you meant when you say you have lost $15 per day by not getting up there, is it not?

A. Yes, sir.

Q. Now, you left Victoria on the 31st of August?

A. Yes, sir.

Q. You got back to Victoria on what date?

A. Between the 8th and 9th of September.

Q. So you were gone, all told, eight days?

A. Between eight and nine.

Q. Now, when you got back to Victoria was there not

a great many miners who outfitted in Victoria for the Klondike regions?

A. Yes, there were some in our party outfitted there.

Q. To your knowledge a great many have outfitted there? A. From all reports they have.

Q. Was there a market for Klondike outfits in Victoria in August and September?

A. I suppose so.

Q. The outfit that you took was not perishable stuff, was it? A. Yes, sir.

Q. It was stuff calculated to last you for six months to a year? A. Yes, sir.

Q. Did you endeavor to sell that outfit to anyone in Victoria?

A. Not after I found the amount of duty I had to pay.

Q. You did not pay any duty?

A. I did not pay any duty to bring it back.

Q. Then what were the charges of $50 and $8?

A. Well, we have had to take and pay money out here to get out our manifests, in the first place; then when we got back from our trip we had to pay money there to get it out of the ship, and then we had to pay to get it back to Seattle, and we paid drayage, all of that would amount to $8.00.

Q. The drayage was a small part? A. Yes, sir.

Q. Now, when did you get it back?

A. I got it back some time in September, the latter part of September received it here at Seattle.

Q. Where were you from the 9th of September when you got back to Victoria?

A. Partly in Victoria and partly here.

Q. What were you waiting for?

A. I was waiting to have my fare settled up there. As soon as I got my freight I came back here.

Q. You were not contemplating to go up to Dawson City then?

A. We were figuring if there was any chance to get there.

Q. You did not sell your outfit because you were waiting to see if the agents of the company could carry out their contract with you? A. Yes, sir.

Q. Did you have a conversation with the alleged agents of the company you met over there?

A.

Q. You met them here after returning as well as before you went?

A.

Q. You knew that they were over here after you returned to Victoria from Comox?

A. The older McGuire, the president, was at Victoria; he came over there.

Q. You stayed at the hotel there in Victoria, then, from the 8th to the end of September?

A. No, sir, partly there and partly here between these two points, Victoria and Seattle.

Q. Did you not state in your direct examination that McFarland would pay for everything that did not amount to more than $1.25 per day?

A. Yes, sir.

Q. Does that refresh your recollection, and did you not stay there until the 31st?

A. We are talking about the return. We put up for our expenses at Victoria and paid our own expenses here after we returned. The beginning of the trip was all paid by those people.

Q. By McFarland?

A. By the Portland Company.

Q. By McFarland? A. Yes, sir.

Q. When you brought your outfit back here your provisions were mostly in unbroken packages?

A. They were all packed the same as they left here.

Q. What effort did you make to sell them here at Seattle? A. I did sell them.

Q. To whom did you sell them?

A. I went down to the people I bought the goods from and returned them to them.

Q. And you lost $50 on those groceries?

A. Not on that alone; I had hardware and medicines I lost $50 on the whole.

Q. How much did you pay?

A. $190, about that.

Q. And how much did you get from the various parties for it?

A. Some of it I sold to a man at the Western Hotel, some to the grocery people.

Q. How much did he pay you?

A. I think about $50, including medicines and clothing that cost about $85 or $80; I returned my provisions, $76, to Louch, Augistine & Co., and got $60 in return for it.

Q. You did not try to sell these things, then, to other parties going to Alaska?

A. No, sir, only just as I tell you.

Q. There were other parties still going to Alaska, was there not? A. Well, yes.

CHARLES RUFF.

Subscribed and sworn to before me this 3d day of Nov., 1897, in the presence of the attorneys of the respective parties, and said witness was first duly sworn by me to testify to the truth, the whole truth, and nothing but the truth.

[Notarial Seal.] G. F. FAY,

Notary Public in and for said State.

TO DAWSON CITY THIS YEAR.

The S. S. "Bristol" to St. Michaels and steamer "Eugene," St. Michaels to Dawson City, Direct.

Monday, August 23.

Three-fourths of a ton of freight and baggage free with passage.

Fare—Seattle to Dawson City, $300.

C. W. Gould, Agent, 619 First Av., Seattle.

It is agreed that the foregoing deposition may be filed in the above entitled cause and used as evidence therein at the trial without objections as to the manner of taking, but reserving objections as to relevancy, materiality, competency and the like.

Dated Nov. 4th, 1897.

JOHN C. HOGAN,
Attorney and Proctor for Libelants.
STRUDWICK & PETERS,
Proctors for Claimant Geer.

[Endorsed]: Deposition of Charles Ruff. Filed this 5th day of November, 1897. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,
Libelants,
vs.
THE STEAMSHIP "EUGENE" and THE PORTLAND AND ALASKA TRADING AND TRANSPORTATION COMPANY,
Respondents.

Answer to Amended Libel.

To the Honorable C. H. Hanford, Judge of the above-entitled court:

Joel P. Geer, claimant of the steamship "Eugene," for his separate answer to amended libel of Gaston Jacobi and Charles Ruff, reserving unto himself hereby the right to include in this his defense to said amended libel matters of law, articulates, propounds, alleges, and denies as follows:

I.

Answering article I of said amended libel, he admits that at the time of the filing of the original libel herein the steamship "Eugene" was at Seattle, in the State of Washington.

II.

Answering article II of said amended libel, he denies that at all or any of the times mentioned therein said steamship "Eugene" was owned by the said Portland and Alaska Trading and Transportation Company, or that it was operated by said company in any manner save as hereinafter set forth, and claimant alleges that he has no knowledge or information as to whether or not said Portland and Alaska Trading and Transportation Company was authorized to do business in the State of Washington ;and he denies that said company was, during said time, engaged in business as a common carrier of passengers, baggage, and freight, between the city of Seattle, Washington, and Dawson City, N. W. T., Dominion of Canada ;and he denies that during all or any of said times one E. B. McFarland was the general manager, or C. W. Gould was the agent of said steamship

"Eugene," or that either was duly authorized and empowered to enter into any and all contracts, or any contracts whatever, on behalf of said steamship "Eugene" or of said company, for the transportation of passengers, baggage, and freight from said city of Seattle, Washington, to said Dawson City, N. W. T.

III.

Answering article III of said amended libel, claimant denies that on or about the 11th day of August, 1897, or at any other time whatsoever, or prior or subsequent thereto, the steamship "Eugene" or its manager or agent caused it to be publicly or extensively advertised, or at all advertised, that said steamship "Eugene," in tow of the steamship "Bristol," would leave Seattle, Washington, for Dawson City, N. W. T., on the 23d day of August, 1897, as alleged in said amended libel, or in the advertise ments attached thereto, marked respectively Exhibits "A" and "B"; and denies that the Portland and Alaska Trading and Transportation Company was the owner of said steamship "Eugene" at such time, and claimant has no knowledge or information as to the publication or circulation of said advertisements, or the connection of respondent, the Portland and Alaska Trading and Transportation Company, therewith, and he denies that any of said advertisements or matters growing out thereof consititute any part of the the alleged contract between libelants and the Portland and Alaska Trading and Transportation Company which formed the basis of said libel.

IV.

Answering article IV of said amended libel, claimant has no knowledge or information as to the reliance, if

any, placed by libelants upon said advertisements or oral representations or promises of a like nature, or otherwise; and he denies that the same form any part of said alleged contract; and he denies that the owners of the "Eugene" made any written or oral representations or promises whatever to libelants, or otherwise; and he denies that libelant Gaston Jacobi, on or about the 19th day of August, 1897, or at any other time, made or entered into a contract with said steamer "Eugene," through her owners or otherwise, wherein or whereby said steamship "Eugene" undertook, promised, or agreed to carry libelant from said city of Seattle, Washington, to said Dawson City, N. W. T., via the port of St. Michaels.

Denies that said steamship "Eugene," through her owners, manager, or agent, promised or agreed that said steamship "Eugene" would leave Seattle, Washington, on the 24th day of August, 1897, or at any other date or time, or that she would reach said Dawson City not later than September 15th, 1897, or at any other date or time whatsoever; and denies that among other things it was agreed by or between said steamship "Eugene," through her owners, agents, or manager, and said libelant, that said steamship "Eugene" would leave the said city of Seattle, Washington, in tow of said steamship "Bristol," or would be towed by said "Bristol" from Seattle to said port of St. Michaels, Alaska, or that she agreed to continue said voyage up the Yukon river to Dawson City, or that she would reach there on September 15th, as aforesaid, or that in consideration of said alleged promises, or any promises, libelant engaged passage on said steamship "Eugene" from Seattle, Washington, to said Dawson City, or paid therefor passage money amounting to $300.00, or any sum whatever, for the conveyance of himself, his baggage, or freight, or that he received tickets therefor; and denies that libel-

ant ever engaged passage on said steamship "Eugene" from Seattle, Washington, to Dawson City at all; and claimant hereby calls upon libelant to produce, for inspection of this claimant and respondent, the passage tickets alleged as so received.

V.

Answering article V of said amended libel, claimant denies that there was any contract whatsoever as alleged therein, or that on or about the 24th day of August, 1897, or at any other time, said steamship "Eugene" entered upon the performance of said alleged contract, or that she left Seattle in tow of said steamship "Bristol," or that she undertook to carry libelant or other passengers over the whole of said voyage, or any part thereof, or that she proceeded upon said alleged voyage for the distance of upwards of six or seven hundred miles, or any other distance, up to the coast of Alaska, or that she abandoned said voyage, or refused to proceed further thereon or that any such alleged contract existed between said steamship "Eugene" and libelant, or that she failed or neglected to keep the same.

VI.

Answering article VI, claimant denies that libelant, on the faith of said alleged representations or agreements, went to a large or any expense to prepare himself for said voyage or purchased an outfit therefor at an expense of $200.00, or at any expense, or that by the failure on the part of said ship to keep said alleged agreement it was rendered valueless to him; and claimant denies that libelant is entitled to recover for said alleged breach damages from anyone for loss of time or hinderance in carrying on his business or work, for the reason

that the same are too remote and speculative, and furnish no basis for a recovery.

Further answering the libel of said Gaston Jacobi, claimant alleges:

That prior to the 31st day of July, 1897, Francis B. Jones and Joel P. Geer, being part owners of the steamship "Eugene," then belonging to the port of Portland, State and District of Oregon, entered into a contract and agreement with respondent herein, the Portland and Alaska Trading and Transportation Company, in words as follows, to-wit:

This agreement, made this 31st day of July, 1897, by and between Francis B. Jones and Joel P. Geer, of the city of Portland, Multnomah County, Oregon, and the Portland and Alaska Trading and Transportation Company of the same place, witnesseth:

That whereas, the said Francis B. Jones and Joel P. Geer are desirous of placing the steamer "Eugene," now plying as a passenger boat upon the Willamette river, upon the Yukon river, in the territory of Alaska and the Northwest Territory of Great Britain, adjoining thereto, for the purpose of running the said boat upon the said river;

And whereas, the Portland and Alaska Trading and Transportation Company are desirous of using the said boat for the purpose of transporting freight up the Yukon river to Circle City or Dawson.

Now, therefore, in consideration of the premises, and the further consideration of one dollar in hand paid the said Francis B. Jones and Joel P. Geer, have, and do hereby agree to and with the said Portland and Alaska Trading and Transportation Company to turn over the possession of the said steamer "Eugene" to the said Portland and Alaska Trading and Transportation Company, for the purposes aforesaid, of taking the same to and up the Yukon river to such point of the same as the said

Portland and Alaska Trading and Transportation Company may desire, and when the said steamer "Eugene" has arrived at the terminal point decided upon by the said Portland and Alaska Trading and Transportation Company, upon the said river Yukon, and hath discharged her cargo within a reasonable time under existing conditions, the said Portland and Alaska Trading and Transportation Company shall turn over the said steamer to the Willamette and Columbia River Towing Company and Joel P. Geer, and to there enter a joint traffic interchange between Portland, Or., and Dawson City, Alaska, for the ensuing year, on a basis of 40 per cent to the steamer "Eugene," and 60 per cent to the Portland and Alaska Trading and Transportation Co. of through rates, details of which to be entered into before sailing from Portland, without charge, cost, or expense to them. But it is expressly understood that the said Portland and Alaska Trading and Transportation Company do not hereby agree to transfer said steamer safely to the said Yukon, but only to make the endeavor so to do, using all proper precaution and care in said effort But if said steamer "Eugene" shall fail to reach the Yukon river or said point of destination by reason of any infirmity in the character of the steamer, but without negligence upon the part of the agents of the said Portland and Alaska Trading and Transportation Company, the latter shall not be responsible in any way for the loss of the said steamer or its failure to arrive at the proposed terminal destination.

And the said Portland and Alaska Trading and Transportation Company, in consideration of the premises, and that the said Francis B. Jones and Joel P. Geer have put the said steamer "Eugene" in to their possession for the aforesaid purposes, hath and do hereby agree to put the said boat at their own proper cost, charge and expense, into such condition as will render it, as far as practicable seaworthy and safe to proceed upon the high seas

to the said Yukon river. The said repairs and renewals necessary to be made to and upon the said steamer "Eugene" to be done at once, and to be satisfactory to the said Francis B. Jones and Joel P. Geer before the said steamer leaves the city of Portland.

In testimony whereof, the said Francis B. Jones and Joel P. Geer, and the Portland and Alaska Trading and Transportation Company, by its president, have hereunto set their hands and seals, and the seal of the said company.

F. B. JONES.
JOEL P. GEER.

H. P. McGUIRE, For the Portland and Alaska Trading and Transportation Co.

That thereafter, and on the 7th day of August, 1897, the Willamette and Columbia River Towing Company and said Joel P. Geer, the then owners of said Steamship "Eugene," then lying in the port of Portland, Oregon, and said respondent, the Portland and Alaska Trading and Transportation Company, entered into a contract relative to said steamship "Eugene," in words as follows, to-wit:

This agreement, made this 7th day of August, 1897, by and between Willamette and Columbia River Towing Company, a corporation, and Joel P. Geer, of the city of Portland, Oregon, and the Portland and Alaska Trading and Transportation Company of the same place, witnesseth:

That whereas, the said Willamette and Columbia River Towing Company and Joel P. Geer are desirous of placing the steamer "Eugene," now plying as a passenger boat upon the Willamette river, upon the Yukon river, in the territory of Alaska and the Northwest Territory of Great Britain, adjoining thereto, for the purpose of running the said boat upon the said river;

And whereas, the Portland and Alaska Trading and

Transportation Company are desirous of using the said boat for the purpose of transporting freight up the Yukon river to Circle City or Dawson City, Northwest Territory.

Now, therefore, in consideration of the premises, and of the repairs, improvements, and money expended by the Portland and Alaska Trading and Transportation Company upon said steamer "Eugene" in preparing the said steamer for the sea voyage from Portland to St. Michaels, Alaska, and the further consideration of one dollar in hand paid, the said Willamette and Columbia River Towing Company and Joel P. Geer have, and do hereby agree to and with the said Portland and Alaska Trading and Transportation Company to turn over, and do hereby turn over, the possession of the said steamer "Eugene" to the said Portland and Alaska Trading and Transportation Company for the purposes aforesaid, of taking the same to and up the Yukon river to such point of the same as the said Portland and Alaska Trading and Transportation Company may desire, and when the said steamer "Eugene" has arrived at the terminal point decided upon by the said Portland and Alaska Trading and Transportation Company upon the said river Yukon, and hath discharged her cargo, the said Portland and Alaska Trading and Transportation Company shall turn over to the said Willamette and Columbia River Towing Company and Joel P. Geer, without expense to them so far as transporting said steamer "Eugene" to said Dawson City, Alaska. But it is expressly understood that the said Portland and Alaska Trading and Transportation Company do not hereby agree to transfer said steamer safely to the said Yukon, but only to make the endeavor so to do, using all proper precaution and care in said effort. But if the said steamer "Eugene" shall fail to reach the Yukon river or said point of destination by reason of any infirmity in the character of the steamer, but without negligence upon the part of the agents

of the said Portland and Alaska Trading and Transportation Company, the latter shall not be responsible in any way for the loss of the said steamer or its failure to arrive at the proposed terminal destination.

And the said Portland and Alaska Trading and Transportation Company, in consideration of the premises, and that the said Willamette and Columbia River Towing Company and Joel P. Geer have put the said steamer "Eugene" into their possession for the aforesaid purposes, hath and do hereby agree to put the said boat at their own proper cost, charge, and expense into such condition as will render it, as far as practicable, seaworthy and safe to proceed upon the high seas to the said Yukon river. In consideration of the money expended by the said Portland and Alaska Trading and Transportation Company in the preparation, repairing, and improvement of the said steamer "Eugene" at the city of Portland, Oregon, so far as to make her seaworthy, the Willamette and Columbia River Towing Company and Joel P. Geer hereby enter into an agreement with and hereby bind themselves to give the passengers and freight offered them by the said Portland and Alaska Trading and Transportation Company at St. Michaels, or any other point agreed upon by them at or near the mouth of the Yukon river, the preference of all other passengers and freight, and hereby enter into a joint traffic agreement, for the term of one year from the time said steamer "Eugene" reaches Dawson City, with the Portland and Alaska Trading and Transportation Company for the interchange of passengers and freight between Portland Oregon, and Dawson City, Northwest Territory, and other points upon the Yukon river reached by said steamer "Eugene," upon the basis of forty (40) per cent of the gross receipts received from all interchangeable passengers and freight to Willamette and Columbia River Towing Company and Joel P. Geer, and sixty (60) per

cent of said gross receipts to the Portland and Alaska Trading and Transportation Company; the feeding and revenue derived from the passengers, and the expense of providing for them upon said steamer "Eugene" is not to be included herein.

In testimony whereof, the said Willamette and Columbia River Towing Company and Joel P. Geer, and the Portland and Alaska Trading and Transportation Company, by its president, have hereunto set their hands and seals and the seal of the said company.

WILLAMETTE & COLUMBIA R. T. CO. [Seal]
By F. B. JONES, President. [Seal]

In the presence of:

Alex. Sweek.

E. B. McFarland.

WILLAMETTE AND COLUMBIA RIVER TOWING CO. [Seal]

[Seal of Portland & Alaska Trading & Transportation Co.] By JOEL P. GEER. [Seal]

M. S. JONES, Secretary.

PORTLAND AND ALASKA TRADING AND TRANSPORTATION COMPANY.

[Seal of Willamette and Columbia River Towing Co.] By W. W. McGUIRE, Sec.

That in pursuance of said contracts, and in conformity therewith, said owners of said steamship "Eugene" turned the possession of her over unto the said Portland and Alaska Trading and Transportation Company for the purposes thereof, and not otherwise, and said Portland and Alaska Trading and Transportation Company proceeded to refit said steamer "Eugene" in accordance with the provisions of said contracts; and claimant avers that the said "Eugene" was not an ocean going vessel, but a light draught river steamboat, then plying upon the waters of the Willamette river in the State of Oregon, and was well known as such both in the community of Portland and Seattle, and that her use upon the seas or any use as carrier of freight, passengers, or baggage was

never contemplated between her owners and the said Portland and Alaska Trading and Transportation Company, and that the delivery of said steamboat "Eugene" by her said owners to said Portland and Alaska Trading and Transportation Company, of Portland, Oregon, was in accordance with said contracts and not otherwise, and for the purpose of fitting up said vessel and bringing the same from Portland, Oregon, to St. Michaels, Alaska, between which said latter point and Dawson City the owners of the "Eugene" and said Portland and Alaska Trading and Transportation Company desired and agreed to operate said boat. That thereafter, and before the departure of said boat from Portland, Oregon, the Yukon Transportation Company of Portland, Oregon a corporation organized and existing under the laws of the State of Oregon, by purchases from said Willamette and Columbia River Towing Company and said Joel P. Geer, became the owner of said steamship "Eugene," and is the owner thereof, and claimant is master and bailee thereof, on behalf of said owners.

That thereafter said steamboat "Eugene," by her own power, proceeded from Portland to Astoria, in the State of Oregon, and from said latter point was towed by the tugboat "Escort" to Port Angeles, in the State of Washington, and from said last-named point proceeded with her own power to Comox, British Columbia, and at or about said last-named point was taken in tow by the steamship "Bristol," such towage being for the purposes mentioned in the said contracts of July 31st, 1897, and of August 7, 1897, and not otherwise; and when said steamboat "Eugene" had proceeded as aforesaid a distance of 600 or 700 miles from Comox, British Columbia, heavy weather was encountered, and said steamboat "Eugene" began to strain heavily and spring leaks, and was compelled to and did return to Port Townsend in the State of Washington, and thence proceeded to Seattle,

Washington, for repairs, at which said latter point she was lying at the time of her attachment at the instance of libelants, and this claimant alleges that the libelant Gaston Jacobi purchased from F. C. Davidge & Co., at Seattle, Washington, passage upon the steamship "Bristol," from Victoria, B. C., to St. Michaels, Alaska, thence operated by said F. C. Davidge & Co. under time charter, and thereafter embarked upon said steamship "Bristol" together with his freight and baggage, and at the same time purchased from the Portland and Alaska Trading and Transportation Company a ticket from St. Michaels, Alaska, to Dawson City, N. W. T., which this claimant is informed and believes, and therefore so alleges, read as follows:

No. 6. Portland and Alaska Trading and Transportation Co.

Good for one passage from St. Michaels to Dawson City, N. W. T., via S. S. "Eugene." Name, Gaston Jacobi.

E. B. McFARLAND, Gen. Manager.

And claimant alleges that neither libelant Jacobi nor his baggage or freight were ever on board the steamer "Eugene," and that the voyage of said vessel contemplated under said contract evidenced by said ticket was to begin at St. Michaels, Alaska, and end at Dawson City, N. W. T.; and that neither said libelant nor said steamboat "Eugene" ever arrived at St. Michaels, and that said contract was wholly executory.

And claimant further avers that by reason of the fact that the steamboat "Eugene" was not a seagoing vessel, and was commonly and generally known as such, neither said Portland and Alaska Trading and Transportation Company, nor owners of said steamboat "Eugene," nor claimant, ever promised or agreed that said vessel could in fact undergo the trip to St. Michaels and there place herself in readiness to proceed up the Yukon river and

from St. Michaels to Dawson City; and claimant alleges that no absolute representations or warranty that she would arrive at St. Michaels on or before September 15, 1897, or at any other time, were made by said Portland and Alaska Trading and Transportation Company to libelant, but only that an attempt would be made to bring her to said point; and claimant avers that said attempt was so made, and by stress of weather said boat was unable to proceed to St. Michaels, and was obliged to abandon the attempt, and return to Port Townsend.

And claimant further avers that libelant, prior to the institution of this suit, released said steamer "Bristol" and said F. C. Davidge & Co. from his contract with them and said steamship for the conveyance of himself from Victoria to St. Michaels, and that the conveyance of libelant contemplated under said ticket on the steamboat "Eugene" was from St. Michaels, Alaska, to Dawson City, and not otherwise; and that neither the said libelant nor said steamer "Eugene" ever arrived at the port of St. Michaels, at which said point said voyage was to commence; and claimant further avers that no part of the passage money alleged as paid was ever paid to or received by the Yukon Transportation Company of Portland ,Oregon, owner of the "Eugene," or this claimant, as her manager.

And for answer to the cause set up by libelant Charles Ruff, claimant articulates, propounds, alleges, and denies as follows:

I.

He adopts as a part of his said defense to said second cause of action paragraphs I, II, and III .of his answer to the libel and claim of Gaston Jacobi.

II.

Answering article IV of said amended libel, claimant

has no knowledge or information as to the reliance, if any, placed by libelants upon said advertisements or oral representations or promises of a like nature, or otherwise, and he denies that the same form any part of said contract; and he denies that the owners of the "Eugene" made any written or oral representations or promises whatever to libelants, or otherwise; and he denies that libelant Charles Ruff, on or about the 19th day of August, 1897, or at any other time, made or entered into a contract with said steamship "Eugene," through her owners or otherwise, wherein or whereby said steamship "Eugene" undertook, promised, or agreed to carry libelant from said city of Seattle, Washington, to said Dawson City, N. W. T., via the port of St. Michaels.

Denies that said steamship "Eugene," through her owners, manager, or agent, promised or agreed that said steamship "Eugene" would leave Seattle, Washington, on the 24th day of Aug., 1897, or at any other date or time, or that she would reach said Dawson City not later than September 15, 1897, or at any other date or time whatsoever; and denies that among other things it was agreed by or between said steamship "Eugene," through her owners, agents, or manager, and said libelant, that said steamship "Eugene" would leave the said city of Seattle, Washington, in tow of said steamship "Bristol," or would be towed by said "Bristol" from Seattle to said port of St. Michaels, Alaska, or that she agreed to continue said voyage up the Yukon river to Dawson City, or that she would reach there on September 15, 1897, as aforesaid, or that in consideration of said alleged promises, or any promises, libelant engaged passage on said steamship "Eugene" from Seattle, Washington, to said Dawson City, or paid therefor passage money amounting to $300.00, or any sum whatever, for the conveyance of himself, his baggage, or freight, or that he received tickets therefor; and denies that libel-

ant ever engaged passage on said steamer "Eugene" from Seattle, Washington, to Dawson City at all; and claimant hereby calls upon libelant to produce for inspection of this claimant and respondent the passage tickets alleged as so received.

III.

Answering article V of said amended libel, claimant denies that there was any contract whatsoever as alleged therein, or that on or about the 24th day of August, 1897, or at any other time, said steamship "Eugene" entered upon the performance of said alleged contract, or that she left Seattle in tow of said steamship "Bristol," or that she undertook to carry libelant or other passengers over the whole of said voyage or any part thereof, or that she proceeded upon said alleged voyage for the distance of upwards of six hundred or seven hundred miles, or any other distance, up to the coast of Alaska; or that she abandoned said voyage or refused to proceed further thereon, or that any such alleged contract existed between said steamship "Eugene" and libelants, or that she failed or neglected to keep the same.

VI.

Answering article VI, claimant denies that libelant, on the faith of said representations or agreements, went to a large or any expense to prepare himself for said voyage, or purchased an outfit therefor at an expense of $200.00 or at any expense, or that by the failure on the part of said ship to keep said alleged agreement it was rendered valueless to him; and claimant denies that libelant is entitled to recover for said alleged breach damages from anyone for loss if time or hinderance in carrying on his business or work, for the reason that the same are too remote and speculative, and furnish no basis for a recovery.

Further answering the libel of said Charles Ruff, claimant alleges:

That prior to the 31st day of July, 1897, Francis B. Jones and Joel P. Geer, being part owners of the steamship "Eugene," then belonging to the port of Portland, State and District of Oregon, entered into a contract and agreement with respondent herein, the Portland and Alaska Trading and Transportation Company, in words as follows, to-wit:

This agreement, made this 31st day of July, 1897, by and between Francis B. Jones and Joel P. Geer, of the city of Portland, Multnomah county, Oregon, and the Portland and Alaska Trading and Transportation Company of the same place, witnesseth:

That whereas, the said Francis B. Jones and Joel P. Geer are desirous of placing the steamer "Eugene," now plying as a passenger boat upon the Willamette river, upon the Yukon river in the territory of Alaska, and the Northwest Territory of Great Britain, adjoining thereto, for the purpose of running the said boat upon the said river;

And whereas, the Portland and Alaska Trading and Transportation Company are desirous of using the said boat for the purpose of transporting freight up the Yukon river to Circle City or Dawson.

Now, therefore, in consideration of the premises, and the further consideration of one dollar in hand paid, said Francis B. Jones and Joel P. Geer have and do hereby agree to and with the said Portland and Alaska Trading and Transportation Company to turn over the possession of the said steamer "Eugene" to the said Portland and Alaska Trading and Transportation Company for the purposes aforesaid, of taking the same to and up the Yukon river to such point of the same as the said Portland and Alaska Trading and Transportation Company may desire, and when the said steamer "Eugene" has ar-

rived at the terminal point decided upon by the said Portland and Alaska Trading and Transportation Company, upon the said river Yukon, and hath discharged her cargo within a reasonable time under existing conditions, the said Portland and Alaska Trading and Transportation Company shall turn over thesaid steamer to the Willamette and Columbia River Towing Company and Joel P. Geer, and to there enter a joint traffic interchange between Portland, Or., and Dawson City, Alaska, for the ensuing year, on a basis of 40 per cent to the steamer "Eugene," and 60 per cent to the Portland and Alaska Trading and Transportation Company of through rates, details of which to be entered into before sailing from Portland, without charge, cost, or expense to them. But it is expressly understood that the said Portland and Alaska Trading and Transportation Company do not hereby agree to transfer said steamer safely to the said Yukon, but only to make the endeavor so to do, using all proper precaution and care in said effort. But if said steamer "Eugene" shall fail to reach the Yukon river or said point of destination by reason of any infirmity in the character of the steamer, but without negligence upon the part of the agents of the said Portland and Alaska Trading and Transportation Company, the latter shall not be responsible in any way for the loss of the said steamer or its failure to arrive at the proposed terminal destination.

And the said Portland and Alaska Trading and Transportation Company, in consideration of the premises, and that the said Francis B. Jones and Joel P. Geer have put the said steamer "Eugene" into their possession for the aforesaid purposes, hath and do hereby agree to put the said boat at their own proper cost, charge, and expense into such condition as will render it, as far as practicable, seaworthy and safe to proceed upon the high seas to the said Yukon river. The said repairs and renewals necessary to be made to and upon the said

steamer "Eugene" to be done at once, and to be satisfactory to the said Francis B. Jones and Joel P. Geer before the said steamer leaves the city of Portland.

In testimony whereof, the said Francis B. Jones and Joel P. Geer, and the Portland and Alaska Trading and Transportation Company, by its president, have hereunto set their hands and seals, and the seal of the said company.

F. B. JONES.
JOEL P. GEER.
H. P. McGUIRE,

For the Portland and Alaska Trading and Transportation Co.

That thereafter, and on the 7th day of August, 1897, the Willamette and Columbia River Towing Company and said Joel P. Geer, the then owner of said steamship "Eugene," then lying in the port of Portland, Oregon, and said respondent, the Portland and Alaska Trading and Transportation Company, entered into a contract relative to said steamship "Eugene," in words as follows, to-wit:

This agreement, made this 7th day of August, 1897, by and between Willamette and Columbia River Towing Company, a corporation, and Joel P. Geer, of the city of Portland, Oregon, and the Portland and Alaska Trading and Transportation Company of the same place, witnesseth:

That whereas, the said Willamette and Columbia River Towing Company and Joel P. Geer are desirous of placing the steamer "Eugene," now plying as a passenger boat upon the Willamette river, upon the Yukon river, in the territory of Alaska and the Northwest Territory of Great Britian, adjoining thereto, for the purpose of running the said boat upon the said river;

And whereas, the Portland and Alaska Trading and Transportation Company are desirous of using the said

boat for the purpose of transporting freight up the Yukon river to Circle City or Dawson City, Northwest Territory;

Now, therefore, in consideration of the premises, and of the repairs, improvements, and money expended by the Portland and Alaska Trading and Transportation Company upon said steamer "Eugene" in preparing the said steamer for the sea voyage from Portland to St. Michaels, Alaska, and the further consideration of one dollar in hand paid, the said Willamette and Columbia River Towing Company and Joel P. Geer, have, and do hereby agree to and with the said Portland and Alaska Trading and Transportation Company to turn over, and do hereby turn over, the possession of the said steamer "Eugene" to the said Portland and Alaska Trading and Transportation Company for the purposes aforesaid, of taking the same to and up the Yukon river to such point of the same as the said Portland and Alaska Trading and Transportation Company may desire, and when the said steamer "Eugene" has arrived at the terminal point decided upon bythe said Portland and Alaska Trading and Transportation Company upon the said river Yukon, and hath discharged her cargo, the said Portland and Alaska Trading and Transportation Company shall turn over to the said Willamette and Columbia River Towing Company and Joel P. Geer, without expense to them, so far as transporting said steamer "Eugene" to said Dawson City, Alaska. But it is expressly understood that the said Portland and Alaska Trading and Transportation Company do not hereby agree to transfer said steamer safely to the said Yukon, but only to make the endeavor so to do, using all proper precaution and care in said effort. But if the said steamer "Eugene" shall fail to reach the Yukon river or said point of destination by reason of any infirmity in the character of the steamer, but without negligence upon the part of the

agents of the said Portland and Alaska Trading and Transportation Company, the latter shall not be responsible in any way for the loss of the said steamer or its failure to arrive at the proposed terminal destination.

And the said Portland and Alaska Trading and Transportation Company, in consideration of the premises, and that the said Willamette and Columbia River Towing Company and Joel P. Geer have put the said steamer "Eugene" into their possession for the aforesaid purposes, hath and do hereby agree to put the said boat at their own cost, charge, and expense into such condition as will render it, as far as practicable, seaworthy and safe to proceed upon the high seas to the Yukon river. In consideration of the money expended by the said Portland and Alaska Trading and Transportation Company in the preparation, repairing, and improvement of the said steamer "Eugene" at the city of Portland, Oregon, so as to make her seaworthy, the Willamette and Columbia River Towing Company and Joel P. Geer hereby enter into an agreement with and hereby bind themselves to give the passengers and freight offered them by the said Portland and Alaska Trading and Transportation Company at St. Michaels, or any other point agreed upon by them at or near the mouth of the said Yukon river, the preference of all other passengers and freight, and hereby enter into a joint traffic agreement for the term of one year from the time said steamer "Eugene" reaches Dawson City, with the Portland and Alaska Trading and Transportation Company, for the interchange of passengers and freight between Portland, Oregon, and Dawson City, Northwest Territory, and other points upon the Yukon river reached by said steamer "Eugene," upon the basis of forty (40) per cent of the gross receipts received from all interchangeable passengers and freight to Willamette and Columbia River Towing Company and Joel P. Geer, and sixty (60) per cent of

said gross receipts to the Portland and Alaska Trading and Transportation Company, the feeding and revenues derived from the passengers, and the expenses of providing for them upon said steamer "Eugene," is not to be included herein.

In testimony whereof, the said Willamette and Columbia River Towing Company and Joel P. Geer, and the Portland and Alaska Trading and Transportation Company, by its president, have hereunto set their hands and seals and the seal of the said company.

WILLAMETTE AND COLUMBIA R. T. CO. [Seal]
By F. B. JONES, [Seal]
President.

In presence of:
Alex Sweek.
E. B. McFarland.

WILLAMETTE AND COLUMBIA RIVER TOWING CO.
By JOEL P. GEER. [Seal]

[Seal of Portland and Alaska Trading and Transportation Co.] M. S. JONES, Secretary.

PORTLAND AND ALASKA TRADING AND TRANSPORTATION COMPANY.

[Seal of Willamette and Columbia River Towing Co.] By W. W. McGUIRE, Sec.

That in pursuance of said contracts, and in conformity therewith, said owners of said steamship "Eugene" turned the possession of her over unto the said Portland and Alaska Trading and Transportation Company for the purposes thereof, and not otherwise, and said Portland and Alaska Trading and Transportation Company proceeded to refit said steamer "Eugene" in accordance with the provisions of said contracts; and claimant avers that the said "Eugene" was not an ocean going vessel, but a light draught river steamboat, then plying upon the waters of the Willamette river in the State of Oregon, and generally known as such in the community of Port-

land and Seattle, and that her use upon the seas or any use as carrier of freight, passengers, or baggage was never contemplated between her owners and the said Portland and Alaska Trading and Transportation Company, and that the delivery of said steamboat "Eugene" by her said owners to said Portland and Alaska Trading and Transportation Company, of Portland, Oregon, was in accordance with said contracts and not otherwise, and for the purpose of fitting up said vessel and bring the same from Portland, Oregon, to St. Michaels, Alaska, between which said latter point and Dawson City the owners of the "Eugene" and said Portland and Alaska Trading and Transportation Company desired and agreed to operate said boat. That thereafter, and before the departure of said boat from Portland, Oregon, the Yukon Transportation Company, of Portland, Oregon, a corporation organized and existing under the laws of the State of Oregon, by purchases from said Willamette and Columbia River Towing Company and said Joel P. Geer, became the owner of said steamship "Eugene," and is the owner thereof, and claimant is master and bailee thereof, on behalf of said owners.

That thereafter said steamboat "Eugene," by her own power, proceeded from Portland to Astoria, in the State of Oregon, and from said latter point was towed by the tugboat "Escort" to Port Angeles, in the State of Washington, and from said last-named point proceeded with her own power to Comox, British Columbia, and at or about said last-named point was taken in tow by the steamship "Bristol," such towage being for the purposes mentioned in the said contract of July 31st, 1897, and of August 7, 1897, and not otherwise; and when said steamboat "Eugene" had proceeded as aforesaid a distance of 600 or 700 miles from Comox, British Columbia, heavy weather was encountered, and said steamboat "Eugene" began to strain heavily and spring leaks, and was com-

pelled to, and did, return to Port Townsend in the State of Washington, and thence proceeded to Seattle, Washington, for repairs, at which said latter point she was lying at the time of her attachment at the instance of libelants, and this claimant alleges that the libelant Gaston Jacobi purchased from F. C. Davidge & Co., at Seattle, Washington, passage upon the steamer "Bristol," then operated by said F. C. Davidge & Co. under time charter, from Victoria, B. C., to St. Michaels, Alaska, and thereafter embarked upon said steamship "Bristol," together with his freight and baggage, and at the same time purchased from the Portland and Alaska Trading and Transportation Company a ticket from St. Michaels, Alaska, to Dawson City, N. W. T., which this claimant is informed and believes, and therefore so alleges, read as follows:

No. 6. Portland and Alaska Trading and Transportation Co.

Good for one passage, from St. Michaels to Dawson City, N. W. T., via S. S. "Eugene." Name, Gaston Jacobi.

E. B. McFARLAND, Gen. Manager.

Signed, E. B. McFarland, General Manager.

And claimant alleges that neither libelant Jacobi nor his baggage or freight were ever on board the steamer "Eugene," and that the voyage of said vessel contemplated under said contract evidenced by said ticket was to begin at St. Michaels, Alaska, and end at Dawson City, N. W. T.; and that neither said libelant nor said steamboat "Eugene" ever arrived at St. Michaels, and that said contract was wholly executory.

And claimant further avers that by reason of the fact that the steamboat "Eugene" was not a seagoing vessel, and was commonly and generally known as such, neither said Portland and Alaska Trading and Transportation Company nor the owners of said steamboat "Eugene," nor claimant, ever promised or agreed that said vessel

could in fact undergo the trip to St. Michaels, and there place herself in readiness to proceed up the Yukon river and from St. Michaels to Dawson City; and claimant alleges that no absolute representations or warranty that she would arrive at St. Michaels on or before September 15, 1897, or at any other time, were made by said Portland and Alaska Trading and Transportation Company to libelant, but only that an attempt would be made to bring her to said point; and claimant avers that said attempt was so made, and by stress of weather said boat was unable to proceed to St. Michaels, and was obliged to abandon the attempt and return to Port Townsend.

And claimant further avers that libelant, prior to the institution of this suit, released said steamer "Bristol" and said F. C. Davidge & Co. from his contract with them and said steamship for the conveyance of himself from Victoria to St. Michaels, and that the conveyance of libelant contemplated under said ticket on the steamboat "Eugene" was from St. Michaels, Alaska, to Dawson City, and not otherwise; and that neither the said libelant nor said steamer "Eugene" ever arrived at the port of St. Michaels, at which said point said voyage was to commence; and claimant further avers that no part of the passage money alleged as paid was ever paid to or received by the Yukon Transportation Company, owner of the "Eugene," or this claimant, as her manager.

Wherefore, having fully answered unto the said libels of Gaston Jacobi and Charles Ruff, claimant prays that the same may be dismissed and possession of the steamship "Eugene" surrendered to claimant; and that he may recover of and from libelants and their sureties his costs and disbursements and expenses herein.

STRUDWICK & PETERS,
WILLIAMS, WOOD & LINTHICUM,
Proctors for Claimant.

United States of America,
District of Washington,
State of Washington,
County of King, } ss.

I, Joel P. Geer, being first duly sworn, say that I am the above-named claimant, and that the above and foregoing answer is true, as I verily believe.

JOEL P. GEER.

Subscribed and sworn to before me this 4 day of November, 1897.

W. A. PETERS,

Notary Public in and for Washington, Residing at

Due service of the within answer by certified copy, as prescribed by law, is hereby admitted, at Seattle, Wn., Nov. 4, 1897.

JOHN C. HOGAN,

Proctors for Libelants Ruff and Jacobi.

[Endorsed]: Answer of Joel P. Geer, claimant. Filed Nov. 5, 1897. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,
Libelants,

vs.

THE STEAMSHIP "EUGENE" et al.,
Respondents.

And JOEL P. GEER,
Claimant.

Notice to Set Cause for Trial.

To the above-named Claimant, Joel P. Geer, and to Strudwick & Peters and Williams, Wood and Linthicum, his Attorneys and Proctors:

Take notice that at the courtroom of the above-named court, in the city of Seattle, Wash., on the 6th day of Nov., 1897, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, the libelants, in the above action will apply to the above-named court to set down the said cause for trial upon the issues therein, and for an order in said cause referring the same to a commissioner or master of said court, to take down the testimony therein and to report the same to the Court.

Dated Nov. 5th, 1897.

JOHN C. HOGAN,
Attorney and Proctor for Libelants.

Service of copy admitted this 5th day of Nov., 1897.

STRUDWICK & PETERS,
Proctors for Claimant.

[Endorsed]: Notice to set for trial. Filed Nov. 5, 1897 In the U. S. District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,
Libelants,
vs.
THE STEAMSHIP "EUGENE," THE PORTLAND AND ALASKA TRADING AND TRANSPORTATION CO.,
Respondents.

Order of Reference.

The above-entitled action coming on to be heard upon the motion of the libelants therein for an order of reference in said cause to take the testimony and evidence therein and report the same to the Court, and the parties, by their respective attorneys, being present in court and heard, and the Court being fully advised,

It is ordered that said cause be, and the same hereby is, referred to A. C. Bowman, a commissioner of this court, who is hereby authorized and directed to take the testimony and evidence in this cause upon the issues therein, and report the same to this Court with due diligence.

Dated Nov. 6, 1897.

C. H. HANFORD, Judge.

[Endorsed]: Order of Reference. Filed Nov. 6, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,

Libelants,

vs.

THE STEAMSHIP "EUGENE," THE PORTLAND AND ALASKA TRADING AND TRANSPORTATION CO.,

Respondents.

Replication to Claim and Answer of Joel P. Geer

To the Hon. C. H. Hanford, Judge of the above-named Court:

The replication of Gaston Jacobi and Charles Ruff, libelants to the claim and answer of Joel P. Geer, claimant and respondent, alleges, that they will aver, maintain, and prove their libel to be true, certain, and sufficient; and that the said claim and answer of said claimant and respondent is uncertain, untrue, and insufficient.

That as to whether or not, on or prior to the 31st day of July, 1897, Francis B. Jones and Joel P. Geer entered into a contract or agreement with the respondent, the Portland and Alaska Trading and Transportation Co., as set out on pages 5, 6, and 7, and 17, 18, and 19 of the said answer and claim, these libelants have no knowledge or information sufficient to form a belief, and therefore they deny the same; and they deny that thereafter on the 7th day of August, 1897, or at any other time, the Willamette and Columbia River

Towing Company and Joel P. Geer were the owners of the said steamship "Eugene," or that on said date, or at any other time, they entered into the contract with the said respondent set out on pages 8, 9, and 10, and 19, 20, 21, and 22 of said answer and claim; these libelants deny that thereafter, and before the departure of said steamship "Eugene" from Portland, or at any other time, the claimant, the Yukon Transportation Company, by purchase from the Willamette River Towing Company and Joel P. Geer, became the owner of said steamship "Eugene," or in any other manner became such owner, and deny that said company is such owner, and deny that said Joel P. Geer is the master or bailee thereof on behalf of the owners.

That they admit that the said "Eugene" was towed from Astoria, Oregon, to Port Angeles, Washington, by the tugboat "Escort," but deny that the said "Eugene" proceeded by her own power to Comox, B. C., but allege the truth to be that said "Eugene" was at all times, after leaving Victoria, B. C., towed by the steamship "Bristol," mentioned in the libel herein; that they deny that heavy weather was encountered after proceeding a distance of 600 or 70 miles from Comox, B. C., or at any other time in said voyage, or that by reason thereof the said "Eugene" sprung a leak, but allege the truth to be that the said "Eugene," contrary to the representations made to libelants and to the contract in her behalf made with libelants, was unseaworthy, and wholly unfit to proceed upon voyage by reason of her infirm, unsafe, and broken condition.

That libelants deny that they purchased tickets of F. C. Davidge & Co., of Seattle, Washington, as alleged on pages 12 and 24 of said answer and claim, but allege that the passage money was paid by them to C. W. Gould & Co., agents of the said respondents, the Portland and Alaska Trading and Transportation Company, and of

said "Eugene," for a continuous voyage from Seattle, Washington, to said Dawson City, N. W. T.

That replying to the allegations in the said answer on the bottom of page 13 and the bottom of page 25, wherein it is alleged that libelants released the steamship "Bristol," libelants deny the same and each and every allegation thereof, and allege the truth to be that they signed a certain paper exhibited to them on board the said "Bristol" at sea, but that the signing of said paper was done under duress, and by the threats and compulsion of the master of the said "Bristol," that if they would not sign the same said master would land libelants on the coast of Alaska, and leave them there to pass the winter without any suitable shelter, fuel, or provisions, so that their lives would be imperiled by exposure in that severe climate, without money, or means if they had money to leave said place, and said paper was signed after the said "Eugene" had abandoned and given up said voyage, and rendered it impossible for libelants to get to Dawson City that year, and libelants protested against the signing of the same at all times, and when the same was signed, the said E. B. McFarland, manager of the said "Eugene," and Captain Lewis, the master thereof, were both present and advised libelants to sign the same, assuring libelants that so signed under duress and against their protest, said paper was void and of no validity, and said McFarland and Lewis representing to libelants that if they would sign the same, the said "Eugene" would assume all responsibility for the failure of said voyage, and would be liable and responsible to libelants for a return of their passage money and the damages for such failure, and libelants say that they never voluntarily released the said "Bristol" or signed any paper to that effect.

That libelants deny each and every allegation of affirmative matter contained in said answer and claim not hereinbefore specifically denied.

And libelants humbly pray as in and by their libel they have already prayed.

GASTON JACOBI,
CHARLES RUFF,
By JOHN C. HOGAN,
Their Proctor and Attorney.

State of Washington, }
King County. } ss.

Gaston Jacobi, being first duly sworn, on oath says that he is one of the libelants named in the foregoing action, and that he makes this affidavit in his own and his colibelant's behalf; that he has read the foregoing replication, knows the contents thereof, and that the same is true, as he verily believes.

GUSTAV JACOBI.

Subscribed and sworn to before me this 8th day of Nov., 1897.

[Notarial Seal] JOHN C. HOGAN,
Notary Public in and for said State, Residing at Seattle, Wash.

Due service admitted Nov. 8th, 1897.

STRUDWICK & PETERS,
Attorneys for Respondents.

[Endorsed]: Replication. Filed Nov. 10, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

In the District Court of the United States, District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,
Libelants,

vs.

THE STEAMSHIP "EUGENE" and JOEL P. GEER,
Claimant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that upon the filing of this stipulation the above cause may be set down for trial by the Court so as to be tried on the 27th day of November, 1897, or on as early a date thereafter as the Court may fix. It is further stipulated that the cause as to the intervening libelants herein shall be submitted and tried at the same time as the principal cause, and shall abide the issues therein. That the answer of claimant herein shall stand as the answer to intervening libel, and all evidence introduced in reference to libelants Jacobi and Ruff shall be considered as applying also to intervening libelants; and all evidence on behalf of claimant shall be considered against said intervening libelants.

Nov. 20, 1897.

STRUDWICK & PETERS, and
WILLIAMS, WOOD & LINTHICUM,
Proctors for Claimant.

JOHN C. HOGAN,
Proctor for Libelants.

PATTERSON & EASLY,
For Intervening Libelants and for Libelants.

[Endorsed]: Stipulation. Filed Nov. 24, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

In United States District Court for the District of Washington, Northern Division.

GUSTAVE JACOBI and CHARLES RUFF,
Libelants,
vs.
THE STEAMSHIP "EUGENE," and THE PORTLAND AND ALASKA TRADING AND TRANSPORTATION COMPANY,
Respondents.
JOEL P. GEER,
Claimant.

No. 1128.

Testimony.

To the Hon. C. H. Hanford, Judge of the above-entitled court:

Your Commissioner, upon the reference heretofore made, respectfully submits the following report:

That on November 12th, 1897, by agreement of parties, the hearing of testimony was begun, and the following proceedings had:

LIBELANT'S TESTIMONY.

GUSTAVE JACOBI, one of libelants, being duly sworn, testified in their behalf as follows:

Q. By Mr. HOGAN.—You are one of the libelants in this case, are you? A. Yes, sir.

Q. What is your age? A. I am forty-three.

Q. Where are you living at the present time?

A. In Seattle.

Q. When did you come to Seattle?

A. I came to Seattle the first part of July.

Q. From what place? A. From New York.

Q. What is your business or trade?

A. I am a cigarmaker.

Q. Are you acquainted with the steamship "Eugene"?

A. Yes, sir.

Q. When did you first know the "Eugene"?

A. I first came to know that vessel when I seen it advertised in the "P. I."

Q. About what date?

A. It was advertised right along. From about the 16th of August up.

Q. What year? A. This year, 1897.

Q. What was your business in coming to Seattle?

A. My purpose was to come to Seattle and go to Dawson City.

Q. Did you have any business with the steamship "Eugene" through its owners or representatives?

A. Yes, sir.

Q. What was that business?

(Objected to by counsel for claimant until the witness has shown with what persons he had the business, and also shown their competency to contract for the "Eugene.")

Q. State what business you had, just briefly.

A. I took passage on the "Eugene."

Q. From what place? A. From Seattle.

Q. To what place? A. To Dawson City.

(Proctor for claimant moves to strike the answer of the witness as not responsive to the question.)

Q. Now, you may go on and state how you came to take passage from Seattle to Dawson City, and state the facts that led to it.

A. I came here with the intention to go to Dawson City to take passage on the best boat, where I thought it would be possible to get there. Between August 16th, and, I guess, it was around in that neighborhood, I seen an advertisement in a paper, that the "Eugene" was going to make a trip from Seattle to Dawson City, to be towed up by the "Bristol."

(Proctor for claimant objects to what the witness saw in the newspaper as incompetent, irrelevant, and immaterial. Proctor for the libelants proposes to show later that it was there by authority. Proctor for claimant renews the objection.)

A. So, after I inquired, I found out that particulars can be found out in the ticket office, J. Gould, First avenue, so I went there and inquired. When I got there, Mr. McGuire was the president—

Q. Who is Mr. McGuire?

A. Mr. McGuire is the promoter of the Portland and Alaska Transportation and Trading Company—he is one of the promoters.

Q. Do you know what, if any, office he holds in that company?

A. He is president of the company, so Mr. Gould told me.

(Proctor for claimant objects to the testimony as incompetent, on the ground that it would not bind the corporation.)

Q. What was said and done at Gould's office then?

A. I told Mr. Gould, if he thought it was possible for me to get a safe passage from Seattle to Dawson City—so the gentleman told me, that he thought there was the best and the last chance, with the sternwheel boat "Eugene" to be towed up by the "Bristol," and by my paying $300, being secured to be landed in Dawson City, with 1,500 pounds of provision. Mr. Gould told me after I inquired about—I being a stranger here—what kind of a

company it was, Mr. Gould stated that it was the best company, and being sure and secure that if I bought a ticket in his office that I would be safe with my 1,500 pounds of provision, to be landed in Dawson City this fall. Furthermore, I inquired about my outfit and all that was necessary for me to do to get everything here in shape in Seattle, which was necessary for my trip. Mr. Gould advised me to inquire of Mr. McGuire, so Mr. McGuire told me that I ought to go to work and buy my ticket, pay the money for it, and go to work and get my outfit, send my outfit down to the wharf when done, and go as soon as possible on board the "Seattle," which was going to take me over to Victoria, where the "Bristol" would be ready on the 24th of August, to start with the "Eugene" in tow for a trip to the mouth of the Yukon river, where the boat "Eugene" will take us off the "Bristol" and land us on or before the 15th of September in Dawson City.

Q. I would like to ask you if Mr. McGuire mentioned any wharf where you were to deliver the goods.

A. He told me to take my goods down to the wharf, where the Victoria boat in Seattle leaves.

Q. Do you know the name of that wharf?

A. I do not know the name of that wharf; I have forgot it.

Q. I will ask you if it was the Yesler Wharf.

A. It was the Yesler Wharf.

Q. And what further did he say about them after you delivered them there?

A. I bought my ticket and paid the money for it; after I had my outfit in shape, Mr. Cooper and Levy, the place where I bought my outfit, I went back to Gould's office and I inquired for Mr. McGuire. After I met the gentleman I told him that I had my outfit, everything was in complete shape, and I was ready to go, so Mr. McGuire told me to go to work and get my—send my whole

outfit down to the wharf, the Yesler Wharf, and that was all that was necessary for me to do. Of course, just as soon as I would deliver my goods at Yesler Wharf, the Portland and Alaska Transportation Company would take care of it, and I would not have any more trouble or bother whatever with it until we reached our destination, Dawson City.

Q. Was anything said as to the marking of these goods by Mr. McGuire?

(Objected to by proctor for claimant as leading.)

A. He told me to mark the goods "S. S. 'Eugene,' Dawson City," and my name.

Q. State whether or not you marked them that way?

A. We did mark them that way.

Q. What did you do with reference to the delivery of these goods, afterwards, if anything?

A. I done just exactly as Mr. McGuire told me to do, and furthermore he told me, after I had asked him about my going over, and he says, "The sooner you go over, the better it will be for you, because there will be a rush"; so I left.

Q. And before you leave that, I would like to ask you if you have these advertisements that you saw in the papers advertising this trip?

A. Yes; I found part of them and I have got them right here—the whole outfit.

Q. Are these the papers? A. Yes, sir.

Q. How many of them are there?

A. Ten, I believe.

(Proctor for libelants offer papers identified by the witness in evidence. Proctor for the claimant objects to the admission of these advertisements in evidence on the ground that they are irrelevant, incompetent, and immaterial, and no proper ground has been laid for their admission. The source of their publication or distribution is not shown, nor any such source as to bind the

claimant or the steamer "Eugene." Furthermore, the alleged advertisements and articles are fragmentary evidence. Proctor for libelant states that he expects to show by other witnesses that these advertisements were published by the authority of the steamship "Eugene" and her managers and owners. Proctor for claimant renews his objection, and makes the further objection that they are irrelevant and immaterial, for the reason that it is not shown that the witness acted on and had reliance on the advertisements.)

Q. I wil ask you about these clippings, Mr. Jacobi; from what papers were they taken?

A. I took them from the "Post-Intelligencer" of Seattle.

Q. I will ask you whether or not they include the whole article in every case.

(Objected to by proctor for claimant as grossly leading and further, for the reason that the paper would show for itself.)

Q. Whether they include the whole piece written in the paper each time? A. Yes, sir.

Q. I will ask you whether or not these are the advertisements you refer to or part of them, in your testimony, where you saw the reports of the "Eugene" in the papers here. A. Yes, sir.

(Papers marked Libelant's Exhibit "A," "B," "C," "D," "E," "F," "G," "H," "I," and "J," and returned herewith.)

Q. Now, did you see any other written advertisements before you bought your ticket at the office of Gould and Company as to this expedition?

A. Yes, sir, I did.

Q. Describe that advertisement—not what its contents were, but where it was.

A. I seen one at Mr. Gould's office. I seen a big ad-

vertisement right in front of the door; it was about two feet long by one foot wide.

Q. Have you that advertisement?

A. No, sir, I could not get it.

Q. Have you tried to get it?

A. Yes, I tried to get it, but Mr. Gould told me that there was a rule, generally, to destroy those advertisements after they were done with selling tickets.

Q. What did that advertisement state?

(Objected to by proctor for claimant for the reason that no proper foundation has been laid for the introduction of secondary evidence.)

A. It stated that the S. S. "Eugene" was one of the best and finest boats, sternwheeler, being towed up by the powerful S. S. "Bristol," to the mouth of the Yukon, and from the mouth of the Yukon, going up to Dawson City with her passengers, from Seattle.

Q. I will ask you if there was anything said as to the company or fare?

(Objected to by proctor for claimant as leading.)

A. As much as I could learn, as I could inquire, I found out that—

Q. On the bill, I say, which you read.

A. It said on the bill, of course it said on the bill, one of the best kind of boats made up for that purpose for a river boat. She is a powerful boat and in A No. 1 shape.

Q. What about the amount of passage or fare for the trip?

A. It said that the whole trip from Seattle to Dawson City, the fare would be $300.

Q. Did it purport to be signed by any person, any name attached to it?

A. That is something I could not remember.

Q. But it was on a bulletin in Gould's office?

(Objected to by proctor for claimant as leading.)

A. Yes, sir.

Q. Now, when did you leave Seattle on this trip?

A. I left Seattle August 22d.

Q. How did you go over?

A. I went over on the steamship "Seattle," on the 22d at 10 o'clock in the evening.

Q. At whose request or under whose direction, if anyone's?

A. The direction of Mr. Gould and Mr. McGuire. When I bought my ticket, I thought that the "Bristol"—

(Proctor for claimant objects to the witness stating what he thought.)

A. —would take the "Eugene" from Seattle on the trip.

Q. Did they tell you that?

A. That's what I understood when I first inquired at Mr. Gould's office about the trip.

Q. What amount did you pay for your passage?

A. I paid $300.

Q. Who did you pay it to?

A. I paid it to Mr. Gould.

Q. Who was present when that was paid?

A. Mr. Gould's clerk was present.

Q. Anybody else? A. Nobody else.

Q. Then what time did you reach Victoria?

A. I reached Victoria the next morning about 8 o'clock, on or before.

Q. Did you pay any passage money to the "City of Seattle"? A. No, sir.

Q. That was part of the trip? A. Yes, sir.

Q. Well, what did you do after getting to Victoria?

A. After I got to Victoria, I went to a hotel, the Queen's Hotel.

Q. Who, if anybody, did you see there, relating to the steamship "Eugene"?

(Objected to by proctor for claimant as leading.)

A. The next day I met Mr. McGuire over in Victoria, and he told me that after I inquired how our—

(Objected to by proctor for claimant as not responsive to the question.)

A. — situation was, told that everything was bright and fair, and that he expected the "Bristol" over on August 24th, and that everything would be in complete shape; so we waited there. Mr. McGuire told us the next day that he is going to leave us again, but Mr. McFarland, which was introduced to us as being the manager of the whole expedition, was going along with us and that he handed us over in his hands, and that Mr. McFarland will take care of us until we reach our destination, Dawson City.

(Proctor for claimant moves to strike the answer of the witness as irresponsive to the question, and objects to it as incompetent and irrelevant, and as to any statements or representations of McFarland or McGuire, since no connection is shown between them and the claimant of the ship "Eugene.")

Q. Go on.

A. So we stayed there; the 24th and 25th passed by; we were anxious, for we thought that the delay of our time, the time set to leave—the 24th—every day delay would probably bring us in bad shape, so all of the passengers of the expedition were present, got in a meeting, Mr. McFarland was present. Of course most of the people—part of it invested all the money they had in their outfit and in their passage ticket, and they were kind of anxious about their board.

(Proctor for claimant objects to all this testimony as irresponsive and incompetent.)

A. Mr. McFarland stated in that meeting that from the dates that our tickets called, which was on the 24th of August, we would be in their hands, and they would take care of us; they would pay our board just about the

same as if we were on board of the ship. We waited and waited until August 31st, when the "Bristol" arrived. We took passage on the "Bristol."

Q. Did McFarland pay your board?

A. Mr. McFarland paid our board bill and everything was paid up to the date we left Victoria. He paid as much as a dollar and a half a piece—part of it less.

Q. Go on then.

A. Everything went on nice and bright. The same morning when we were ready to go we were all around the wharf, and the next thing we seen the sternwheel ship "Eugene" coming up, pulling in close on to the "Bristol," and heard the conversation between the two captains, the captain of the "Bristol" and the captain of the "Eugene"; the captain of the "Bristol" told the captain of the "Eugene" to pull out, we were ready to go, and go ahead. Well, the "Eugene"—

(Objected to by proctor for claimant as incompetent, irrelevant, and immaterial.)

A. —went ahead, and in about a couple of hours, a little more or less, we started and went on and picked up the "Eugene" and took the "Eugene" in tow, and went that night and all that day and that night and the next day, and the next evening, on or before 4 o'clock, or after 4 o'clock, we arrived at Comox.

Q. Was the "Eugene" in tow all the time?

A. Yes, the "Eugene" in tow right along, and I was surprised—

(Proctor for claimant objects as immaterial.)

Q. Do not state what you were surprised by, but what you saw.

A. That the "Bristol" was coaling up. Of course Mr. McFarland told us that after the "Bristol" coming over to Victoria everything was in complete shape; she was coaled up and everything, and we would pull out that day; no further delay. So we laid in Comox for three

days. The "Eugene" was tied up alongside the "Bristol," and the passengers communicated from one boat to the other; you could go on either one boat or the other. About the third day, when we were pretty near ready to go, some of the miner's outfits in the front of the "Bristol" was transferred from the "Bristol" to the "Eugene," and part of my stuff went too, and so I inquired of the mate, and the mate he says the "Eugene" was loaded too heavy in front—

(Proctor for claimant objects to anything the mate told the witness, as incompetent.)

A. —the "Bristol" being loaded too heavy in front.

Q. How long did they transfer the freight or outfits?

A. That took them about four hours, and they even asked the passengers to work, and they did it freely.

Q. How did they do it?

A. They hoisted out with a steam winch and carried it over on their backs.

Q. How many men were working at it?

A. There was about, in my estimation, 12 or 14.

Q. For how long?

A. For about four hours.

Q. Well, did you see any of your outfit on the "Bristol" before that time?

(Objected to by proctor for claimant as leading.)

A. No, sir, but I knew when I was on board the "Bristol," I looked down the main hatch through the fore hatch to see where our goods were stored, and I seen almost all of my outfit was on top of it.

Q. And that is what you say you saw moved?

A. Yes, sir, and there was something happened which I did not very well understand—

(Objected to by proctor for claimant as not responsive to the question.)

Q. State what happened there then.

A. The sheriff or constable came over on the "Bris-

tol" and climbed over from the "Bristol" onto the "Eugene," and put a paper on the mast on the "Eugene" and tied her up, the way, I understood, on account she broke the law—

(Object to by proctor for claimant as incompetent, irrelevant, and immaterial as to what the witness understood.)

A. (Continuing.) In Victoria.

Q. Well, then when and how did the expedition leave Comox?

A. When we were ready to go out all together, all at once, the "Eugene" broke loose and steamed off; there was quite an excitement on the deck, and the sheriff came running along and was going to send another boat after the "Eugene," and so we got loose and went off with a "Hurrah." We went up and caught the "Eugene," picked the "Eugene" up, took the "Eugene" into tow, and went.

Q. How long after leaving Comox before you—

A. We left Comox—it's about a space between four hours. We went up, picked the "Eugene" up, took the "Eugene" in tow, and went that day and that night and the next day until about four o'clock in the afternoon; I heard some hollering on the "Eugene," which was in tow of the "Bristol," while I was under deck. I hurried on deck and seen the "Eugene" pretty near half way up towards the "Bristol." I seen two fellows holding up two blackboards, above their heads, and as much as we could make out was, "We are broke down. Take us back to the nearest port," when the "Eugene" fell back, and the "Bristol" swung off from her course, and went back that day, the very same day, towing the "Eugene" right along to a little Indian station or village, called Alert Bay, and there we got the "Eugene"—the "Bristol" went to anchor and the "Eugene" was pulled up alongside of the "Bristol," and people went freely from boat to boat. We

laid there for three days. By that time several meetings were held on account of what to do further. There we found that our trip could not be done.

(Objected to by proctor for claimant as incompetent, without the witness showing from whom such was found out, and unless they were persons who could bind the claimant.)

A. (Continuing.) The second day we laid there, Mr. Van Ness, which was the secretary of the passengers' organization, which was organized in Victoria, came over after we had the meeting, and some of the passengers from the "Eugene" were afraid, and came over to the "Bristol," and Mr. Van Ness told me and several others of the passengers that he would not go to work and stay on the "Eugene" overnight. We did not know what might happen, and we did not know what kind of steps we were going to take to see that everything would go on all right, so we decided to take our blankets and mattresses over on the "Eugene" that night, and we went to sleep and watched her, and I had a conversation with Captain Lewis about the same thing.

Q. Who was Captain Lewis?

A. He was captain on the "Eugene." He was proud of us, and he told us he was proud of us that we were not afraid, and that there was no danger at all on the "Eugene." The next morning I heard some hollering—my time was off and someone else was on the watch, I don't know who it was—and I got up and run on deck, and somebody hollered over that "McFarland is going to leave us with his wife and boy and baggage," and so we hurried down on the "Eugene" and looked out overboard, and there we seen McFarland was going to step in the boat and was going to push off—

(Objected to by proctor for claimant, as incompetent, irrelevant, and immaterial, and as not responsive to the question.)

A. (Continuing.) When Mr. Van Ness ordered them back. So he did. The next day, early in the morning—

(Objected to by proctor for claimant, for the reason that counsel for libelant is not putting questions to the witness, and for the reason that this is purely a voluntary statement by the witness, and is incompetent, irrelevant, and immaterial.)

Q. Proceed.

A. A meeting was held the next morning, and Mr. McFarland, by failing to leave us that night or that morning, seemed to be more downhearted. We called a meeting the next morning and was asked by the organized passengers, president, and chairman, how to go further and what to do. It was asked if it was possible, and that if the "Eugene" really broke down, to be repaired.

Q. Where was Captain Lewis at that time?

A. Captain Lewis was introduced to the meeting by Mr. McFarland as an old sea captain around Alaska for the last 16 years, and the best man who could give us the best information about our whole trip, and the best we could do under the circumstances, where we were at the present time. So Mr. Lewis stood up in front of the meeting there and told us that he knew all about St. Michael.

(Proctor for claimant objects to any representations or statements of Mr. Lewis as incompetent to bind the "Eugene" or this claimant, and desires it to be understood that he objects to any representations or statements by McFarland or the McGuires or Mr. Lewis, and desires that it be understood that this objection is urged to all such testimony without interrupting the witness.)

Q. What was the relation of Mr. Lewis to the "Eugene," if you know?

A. Mr. Lewis was leading captain of the "Eugene."

Q. Now, go on and state what he said.

A. He was introduced to the meeting by Mr. McFar-

land to state and to tell us that if it was impossible for us to go down to Dawson City on the River Yukon by not having a river boat, by not being able to take the "Eugene" along we would not have any chance at all to get to Dawson City and that it was impossible under the circumstances the "Eugene" was in at the present time to take her along and she would not stand the sea, and she was unseaworthy and that it was no use for the "Bristol" to take the "Eugene" up to Dawson City—to St. Michael, so that if we would still stick to it and wanted to go ahead in our expedition, the only chances we would have to reach St. Michael and claimed that St. Michael was a desert island—there was no wood except a little driftwood, and that was all picked up by the Indians, so we would have no chance at all to leave St. Michael, and we had to stay there, and he was quite sure that if we stayed there over the winter that half of us people would be starved to death or froze to death, and saying that it was uselesss for us to go ahead. So Mr. McFarland, after Captain Lewis was done with his speech—Mr. McFarland was asked if the "Eugene could be repaired in time so as to go up anyhow, if it would only take a couple of days. Mr. McFarland denied it; he said no. And he was asked if the "Eugene" would be—could be under any consideration towed up to St. Michael, and he said no; then the passengers had a talk among themselves, what is the best to do. Could not come to any conclusion. Part wanted to go up, the most of them did not know what to do, so Mr. McFarland was asked by the chairman of the passengers' society if he would not think the best thing to do—if he thought the best thing now, under the circumstances, to go back to Victoria and have the best chances there to get the boat repaired. Mr. McFarland said that he could not do nothing in the case, because the present time he said he did not know what to do himself, and he

could not say nothing because there was some more people had been asked about it going back. He said there was Mr. Johnson, the purser on the "Bristol," had to decide about that. He was the promoter of the "Bristol." So Mr. Johnson was called to the meeting and Captain McNamara, the captain of the "Bristol." The captain claimed that he had nothing to do with this at all, that this was Mr. Johnson's place, and that the captain only had to do what Mr. Johnson told him to do. So we asked Mr. Johnson if he was going to take us back, so we could get the "Eugene" repaired in Victoria. Mr. Johnson says, the only thing in this case is, either go up to St. Michael and be set off there, or I have got a paper which you all have got to sign, which means the release of the "Bristol." So we asked Mr. Johnson if he would take the "Eugene" in tow and go to St. Michael; he said that the "Eugene" will not be taken in tow again on the trip to St. Michael, and that we would be set off in St. Michael, and the "Bristol" had fulfilled her duty for what she was chartered for. We asked furthermore what he thought would become of us. He told us that if we didn't like it at St. Michael and we wanted to go back on the same boat, we had to pay for it, which would be $54, and I have forgot how much the freight was, and he was to take us back to Victoria then. So there was another meeting held the very same day in the afternoon, right after dinner, and we seen the miserable situation which we were in by the way of going ahead to St. Michael, and running in that situation where we probably had to risk our lives; by the way, Captain Lews stated as an expert—we called on Mr. McFarland to get us out of the misery. Mr. McFarland advised us by stating the best way in the situation we were in at the present time, that "I advise you to go to work and sign the paper that the purser of the 'Bristol' had," so he signed it and signed it under protest,

and "I hope that we will all together come out on the end satisfactory to everybody," so he said. We all signed and he signed the paper the same time as his wife, and they all signed with the exception of not one. Just as soon as the paper was handed over to the purser, Mr. Johnson, of the "Bristol," the next morning we started off and went back; took the "Eugene" in tow again, and when we asked the captain, Mr. Lewis, to let us go on board the boat, on board of the "Eugene," he said he had changed his mind, and under no consideration would he allow any of the passengers on that boat any more—on the "Eugene" any more.

Q. Why was that, did he say?

A. The reason why, I could not very well understand, and nobody, but after we started up and came close to Victoria, about five o'clock in the evening, we were about between 10 and 15 miles away from Victoria, all at once the "Eugene" slipped the rope and disappeared, off she went and with a "Hooray," we went and arrived at Victoria the same night.

Q. Now, at Alert Bay, where you stopped these three days, I will ask you if any transfers of freight and baggage were made.

(Objected to by proctor for claimant as leading.)

A. Well, after everything was completed, that it was decided that this paper was signed, and it was decided that we were going back to Victoria, then the freight and what was all transferred on the "Eugene" in Comox was carried back on the "Bristol," and everybody helped, even half of the passengers, to get done with is.

Q. Then you came back to Victoria?

A. Then we came back to Victoria.

Q. What time did you arrive at Victoria?

A. We arrived at Victoria it was in the evening, be-

tween six and eight, I think; but I ain't sure of that, because I was so disgusted.

Q. The hour does not matter; what day?

A. The date, I will have to look that up; I could not tell the date for sure, but I can get the date if it is necessary.

Q. Now, when you paid that passage money to Gould, I will ask you whether or not he gave you any papers or tickets of any kind; if so, what.

A. Mr. Gould put the whole tickets and the whole business in an envelope, and he says, "Be very careful, don't lose any; everything is in complete shape."

Q. Have you got these papers that he put in the envelope?

A. I have got one ticket which he put in the envelope and one ticket which I had, and thought it was all right. It was exchanged in Victoria by the firm of Dabidge & Company.

Q. It was exchanged there?

A. It was exchanged there by Dabidge & Company.

Q. What is this paper I show you?

A. This is one of my tickets and the ticket which Mr. Dabidge handed in to me—when we were out the second day from Victoria, the purser came up and he asked for tickets, so I showed him a ticket and he took it away. Now, I says Mr. Johnson, I says—

Q. That is not important. He gave you a receipt in place of it?

A. Yes, he gave me a receipt; I wanted a receipt. So he said all right, here is a receipt for you, and that is what I got.

(Papers offered in evidence by proctor for libelant. Proctor for claimant objects to the introduction of the papers, for the reason that no proper foundation has been laid to show the authority of the person who purports

have issued the paper to bind either the steamship "Eugene" or this claimant. Papers marked Libelant's Exhibits "A" and "L," respectively, and returned herewith.)

Q. Now, I will ask you what your outfit cost you and what it consisted of.

(Proctor for claimant objects to any testimony in support of damages claimed for loss of time or loss of money on account of outfit, as incompetent, irrelevant, and immaterial.)

A. I consider the time I lost—

Q. I asked you first what the outfit consisted of and what it cost?

A. My outfit cost me $268, which was provision and clothing and hardware for a year and a half's outfit.

Q. Was that the outfit you say you delivered to the Yesler Wharf here? A. Yes, sir.

Q. Did you ever get that back?

A. Yes, sir.

Q. When?

A. I got that back, after we were dumped off at Victoria. I had to lay there for four weeks because I didn't have money to pay duty on that.

Q. What was the value of that when you got it back?

A. When I got it back, I sold it, sold the groceries and lost pretty near one-third of it.

Q. How much, in dollars, did you lose on the outfit?

A. I lost on my outfit close on to a hundred dollars.

Q. Now, what time did you lose, how many days in all, as near as you can tell?

A. I lost three months, pretty near, less a couple of days so far.

Q. What would your time be worth per day?

A. My time, as an average, is about five dollars per day. I can prove that I made more than that.

Q. What would your damage be, then, for loss of time, in the aggregate, approvimately, as near as you can tell?

(Objected to by proctor for claimant as incompetent and calling for a conclusion of law.)

A. My damage for time I consider about $300, within that time.

At this time, further proceedings were adjourned until 1:15 P. M.

Afternoon session; continuation of proceedings pursuant to adjournment at 1:15 o'clock.

GUSTAVE JACOBI, on the stand for further direct examination.

Q. (By Mr. HOGAN.) I will ask you if you stated the whole of the conversation between Captain Lewis, Mr. McFarland, and the passengers at the time of the meeting at Alert Bay, whether there is anything further.

A. I can state that we were very doubtful, because we did not know which was right to do. First, Captain Lewis got up and told us that if we signed that paper, as he looked at it, that it would not stand in law at all, because we were forced to do it—running into misery by being landed in St. Michaels. Mr. McFarland got up afterwards and told us that if you release the "Bristol" by signing that paper, that Mr. McFarland would go to work and take the responsibility of the "Eugene" and the Portland Transportation Company, and he furthermore stated that they were earnest business people, and had more business, and would not want to have a bad name in it, and we would get our money back and damages which we were entitled to.

Cross-Examination.

Q. (By Mr. PETERS, on behalf of the claimant Joel

P. Geer. Mr. Jacobi, where did you come from, to the city of Seattle?

A. I came from New York.

Q. New York City or New York State?

A. New York City.

Q. How long have you lived there?

A. I lived in New York City several times. The last time I lived in New York City was for four months.

Q. What was your business there?

A. I made cigars.

Q. What your business address in New York City?

A. 334 East 13th street; that's where I lived.

Q. Were you manufacturing cigars for yourself or for others? A. I worked for a factory.

Q. You are a laborer, then?

A. Yes, sir.

Q. And what did you get?

A. Me and my wife worked together; we got piece-work.

Q. What did you get?

A. We got $12 a thousand.

Q. You and she would take jobs, piecework together, then? A. Yes, sir.

Q. You never figured up exactly how much you got yourself? A. Oh, yes, I can figure that out.

Q. And how did you figure it out?

A. I figured out how many cigars we make, how much I get for a thousand, and how much a bunchmaker gets for making the bunches.

Q. You never figured it up as to how much you would get and how much your wife got? You just figured how much you two got? A. Yes.

Q. Now, did your wife come out here with you on this trip? A. No, sir.

Q. You came out here about the 16th of August, you say, this year?

A. No, the beginning of July.

Q. And how did you happen to meet this man Gould?

A. I came out here with the intention—I am a cigar-maker for 18 years. I was in Australia four years mining, and the last three years I was in Africa prospecting in the southwest mountains, and came over to New York, hearing about the Yukon excitement, the Alaska excitement, about the mining.

Q. You heard about that in the eastern papers?

A. I heard about that in Africa. And there was not much to do in Africa, so I thought well maybe there would be a good chance for me to go back and go up to Alaska.

Q. So that is the way you came to Seattle in July?

A. Yes, sir.

Q. Did you know Mr. Ruff, the other libelant here, before you bought your ticket? A. No, sir.

Q. When did you first meet Mr. Ruff?

A. I met Mr. Ruff in Victoria.

Q. Now, you stated that you took passage on the "Eugene." You meant by that you bought a ticket?

A. Yes.

Q. The ticket that you put in evidence here already?

A. Yes, sir.

Q. As a matter of fact, you never saw the steamer "Eugene" until you got to Victoria, did you?

A. No, sir.

Q. Now, this ticket office of Mr. Gould's, that was in Seattle here, was it? A. Yes, sir.

Q. Where was this sign that you speak of about the "Bristol" and "Eugene" going to Dawson City—whereabouts was that?

A. That was a sign about 2 feet long, about one foot

wide; it was placed, if I mistake not, on the right side going into Mr. Gould's office, on a nail.

Q. It was in the entry of the building, was it not?

A. It was outside.

Q. Outside of the building, entirely?

A. Yes, sir.

Q. Mr. Gould's office is on the ground floor of the building, is it not? A. Yes, sir.

Q. There are other offices in the same building, other rooms?

A. That is something I don't know anything about; I never was upstairs.

Q. On the ground floor are there not other rooms?

A. Not that I know.

Q. You did not examine that so particularly, as you did about the advertisement? A. No, sir.

Q. Now, what sign did Mr. Gould have on his office besides that bulletin?

A. I did not pay any attention to that at all. I seen there was some typewriting machines inside, and I really don't know what, but it seemed to be a ticket office.

Q. How did the sign read about the ticket office?

A. That I could not tell.

Q. Now, did not the ticket broker go to you and offer to sell you a ticket and that is the way you came down to Gould's office? A. No, sir.

Q. How did you come to go to Gould's office?

A. Every morning and every night I read the paper; course I was anxious to go to Dawson City, and I intended in the first place to buy a ticket on the "Eliza Anderson," but when I came to see the boat myself, I found out that it was very risky undertaking, and, of course, I did not like that boat.

Q. So you went and examined the "Eliza Anderson," personally? A. Yes, sir.

Q. State whether or not the "Eliza Anderson" got through, or do you know.

A. I heard about it, but I don't know nothing about that affair.

Q. What is Gould's name in full?

A. If I ain't wrong, it is Jay Gould.

Q. You don't know anything else about the surroundings of the office, excepting that sign?

A. I was there about five or six times, before I bought a ticket. And then I was around and saw Mr. Kline & Rosenberg, and seen Mr. Coleman—he is engaged there—and I inquired about this firm, and he told me that this firm was all right.

Q. Well, you knew Kline & Rosenberg, did you?

A. Yes—I beg your pardon, I knew the man, I didn't know the man from the east, but I got acquainted with him here when I arrived.

Q. Who introduced you to Kline & Rosenberg?

A. Mr. Coleman did.

Q. Coleman told you that this trip was all right?

A. He told me it was the best chance I could get.

Q. You knew that Mr. Coleman told you what he believed to be true? A. Yes.

Q. So you relied on that, didn't you? A. Yes.

Q. Now, you did not learn all that sign had on it at the time that you were buying your ticket?

A. No, sir.

Q. You have been down there since the suit began, to look at it? A. Yes, I inquired around.

Q. You have been down there to see the sign since, haven't you? A. Yes, sir.

Q. Did you ever ask Gould to let you take that sign?

A. No, sir.

Q. The last time you were down there, it was there, was it not? A. You mean now?

Q. Yes.

A. No, I didn't see no sign now.

Q. How long ago since you saw it?

A. Oh, I seen that sign since I was in Seattle, until I left.

Q. Then you haven't seen it since that time?

A. No, sir.

Q. Have you been down and asked Mr. Gould what became of it?

A. I asked him about that; I would like to have one, but he says he didn't have any.

Q. How long ago was that?

A. That was about a week ago.

Q. You made no further inquiry about it?

A. No.

Q. Now, the only reason you say you have for believing that Mr. McGuire was president of that trading company that you speak of was the fact that he told you so?

A. Mr. Gould introduced me to Mr. McGuire.

Q. And told you at that time? A. Yes, sir.

Q. That is the only information?

A. And furthermore, I got acquainted through business people, people from Portland, and they said that Mr. McGuire was a business man in Portland and so was Mr. McFarland, and they knew the men, and they told me they were good earnest business people.

Q. Now, the "City of Seattle," that boat was on her regular run between here and Victoria?

A. Yes, sir.

Q. There were other passengers on there besides yourself, who were going on the "Bristol" to St. Michaels? A. Yes, sir.

Q. You all went along together with these other passengers?

A. Well, I went of course, I went, I didn't know noth-

ing about this until I went according to Mr. McGuire; he told me how to do. I did not want to do nothing without his knowledge.

Q. So you took the "City of Seattle" over to Victoria?

A. Yes, sir.

Q. And on the 31st of the month you went on the "Bristol," and the next stop you made was at Comox?

A. Yes, sir.

Q. Now, the last that you saw of your outfit was when you sent it down to the Yesler Dock in town, was it not?

A. Yes, sir.

Q. Your outfit consisted of food, hardware, and clothing? A. Yes, sir.

Q. Your personal baggage you took along with you on the "City of Seattle" and on the steamer "Bristol"?

A. That was only what you needed?

Q. That's what I mean; such as you usually take in traveling? A. Yes, sir.

Q. Now, when you got to Comox, did you go aboard of the "Eugene"? A. Yes, sir.

Q. You did not take any meals on her, did you?

A. I did not; there were no meals served when I was on her.

Q. You did not have any stateroom on her, did you?

A. No, sir.

Q. None of the passengers had staterooms or meals on her?

A. There was seventeen passengers on the boat right along.

Q. On which boat?

A. On the "Eugene."

Q. You were not one of them, were you?

A. No, sir.

Q. You just went aboard of her at Comox out of curi-

osity, to look over her and see what kind of a boat she was?

A. I went on that boat, my intention that I thought that the "Eugene" was the boat which was in connection with the "Bristol" and considered both boats one body, to make my trip on it.

(Proctor for claimant moves to strike out the answer as irresponsive to the question.)

Q. You just went on board the "Eugene" to look over her?

A. I went on board of the "Eugene" of course to look her over and was proud to see the boat.

Q. You were not on her when she was sailing at all?

A. She was not sailing.

Q. She was anchored at Comox?

A. She was. She was tied to the "Bristol" at Comox.

Q. The "Bristol" was taking coal?

A. The "Bristol" was taking coal.

Q. Was the "Eugene" taking coal too?

A. No, sir. Excuse me, the "Eugene" could not fire any coal, she had all the wood she wanted; she had all the wood on board.

Q. She used wood as fuel?

A. Yes, sir.

Q. And the next time you were on the "Eugene" was at Alert Bay, when you went on there as a committee of the passengers on watch?

A. Yes, sir, I was ordered by Mr. Van Ness, who was secretary of the Miners' Association.

Q. Now, when was this miners' committee organized?

A. The miners' committee was organized in Victoria. The date I could not state, but it was right after the 24th of August.

Q. And whenever you had any—

A. And we seen that every day delay would count on

us, and the committee made up papers over there in the first place, after we had to lay there for nine days, that we were anxious and part of us wanted our money back and so forth, and in that meeting we had that night they said that to keep the men down, said all right, we go, and Mr. McGuire was there and held a speech, and Mr. McFarland was there and held a speech—we will go, but we went from Victoria on our trip under protest, not to be sailed in time on August 24th, when the time was set.

Q. Now, what was the reason of your anxiety about sailing on time?

A. We thought that if we did not get up in time to St. Michael before the river froze up, the "Eugene" would not be able to get to her destination, and would delay the whole expedition.

Q. Now, that is the view the whole committee took of it? A. Yes, sir.

Q. That is the society you speak of?

A. Yes, sir.

Q. Did Mr. McFarland and Mr. McGuire tell you that you would be all right. A. Yes, sir.

Q. Now, all of the grievances that you had, all of the complaints that you had to make was made to this committee?

A. Yes, everybody had a right to explain his complaints.

Q. To the committee?

A. To the meeting to the committee, to the meeting and specially to Mr. McGuire and Mr. McFarland, who were present.

Q. So this committee undertook the management of the party did they not?

A. Yes, sir.

Q. Now, you say that at Comox, they were unloading outfits and freight from the "Bristol" to the "Eugene"?

A. Beg your pardon, there was no freight at all, in this hatch there were only miner outfits, what we called miner outfits, that was all there was in the front hatch.

Q. That is all then that was unloaded at Comox?

A. Part of it was transferred in Comox from the "Bristol" over to the "Eugene," and when we got back and we anchored in Alert Bay, the "Eugene" lay alongside of the "Bristol," and the outfits which were transferred on the "Bristol" in Comox were transferred from the "Eugene" back to the "Bristol" at Alert Bay.

Q. Now, how much of your outfit did you see down in the forward hatch?

A. That is something I could not tell you.

Q. How was your outfit done up?

A. My outfit was all done up in bags, and the common bags around the outside.

Q. It was in several packages was it not?

A. Yes, sir.

Q. Well, it was all mixed in—there were about ninety people in this expedition that you joined?

A. Ninety-four.

Q. All of their outfits were along with yours?

A. Yes, sir, it was all pretty near.

Q. Well, now, you helped to unload from the "Bristol," did you?

A. No, sir, they wanted us to help them, but I did not see any reason what they were going to make this exchange for, I didn't see any reason, so I thought what's the use of my working and not getting anything for it.

Q. They did not take all of the outfits off?

A. No, sir.

Q. You saw them take your outfit off?

A. My outfit was on the top of it when I looked in the

hold. I saw it was on top, and I watched them for a while, but they handled it careless and I got mad at it, and I went away and I didn't want to look at it.

Q. Did you see them take yours out?

A. Yes, sir.

Q. You saw them taking yours out?

A. I saw them take part of my outfit out.

Q. What did you see them take out?

A. I saw them take some of my bags out. I watched the writing on it.

Q. If they were handling it carelessly, why did not you help them?

A. It was an awfully hard position to work in, and I didn't see any reason why they done it, until I asked the mate of the "Bristol," and he says, they want to lighten up the "Bristol" in front; they took more coal than they ought to.

Q. They had to lighten up the "Bristol"?

A. Yes, sir.

Q. They told you that they would take it back at Alert Bay when they had used the coal up; that they would transfer it back then?

A. No, sir.

Q. The reason they transferred it was because they wanted room in the "Bristol" for the coal?

A. No, sir, that was not the idea. The idea was to—

Q. To lighten the "Bristol?"

A. I understood.

Q. She could not take all the coal they wanted to take at Comox and these outfits?

A. The way it looked to me; that's what the mate told me.

Q. So you went away mad?

A. Yes, they wanted everybody to work on it and some of them fellows says: "Why don't you help us, and

hurry up and get done." I didn't see no reason to go to work and pay my passage.

Q. When you went on the "Eugene" at Comox, she looked like a pretty good boat, didn't she?

A. Yes, sir.

Q. You looked her over pretty well?

A. We looked her all over; we went all over the boat.

Q. No, when you left Comox, the "Eugene" left ahead of you? A. No, sir—Comox, yes.

Q. You picked her up on the way?

A. We picked her up on the way.

Q. And you both went into Alert Bay?

A. Then we went up that day and that night and the next day until about four o'clock, when we were out of the islands; we were out in the sea then.

Q. About how far was the "Eugene" from the stern of the "Bristol"?

A. I considered it about a block.

Q. You could hear a man talk from one to the other when he called?

A. You could, yes, sir.

Q. And if a man stood on the bow of the "Eugene" and hollered over to the "Bristol," you could hear them all right, could you not?

A. Oh, I should think you could.

Q. Now, you say that there were men holding up blackboards on the "Eugene" with some writing on them?

A. Yes, sir.

Q. That was the reason that the "Bristol" came alongside, picked her up and went into Alert Bay?

A. I beg your pardon, I was downstairs, and I was reading a book; I had laid down for a little bit, and all at once I heard some hollering and some yelling, and I got up then, and I seen the "Eugene" steaming up and the rope was still on her; she steamed off like this (indicating

one side), then she came by the side of us, and there were two men, each one holding a board up like this, with this writing on it; but you want to excuse this, you know I am a German, and that is what they told me and what I could see, a few of the letters, you know.

Q. She came nearer to you with that board?

A. She came by the side of us.

Q. Then it must have been pretty rough weather, so that you could not hear?

A. No, sir, the weather was not rough at all.

Q. How was it that she had to steam up to you and put writing on the blackboard, if you could ordinarily hear from one boat to the other?

A. I was surprised myself.

Q. Could not see any reason for that.

A. No, sir, not at all.

Q. Must have been blowing then?

A. After the boys came on our boat, after we were in Alert Bay, we inquired about it, and one of the boys says, "What is the use of holding up these planks? If you fellows did not want to stay on the boat, why didn't you say so; we would have been willing to exchange places." They were all sick, you know; they said that the sea was so heavy they all got sick, but I did not; it was my fifteenth trip, so I did not see no sea at all, you know.

Q. You have been at sea to Australia and South Africa? A. Yes, I was to Australia.

Q. Fifteen times you have been over the ocean?

A. Yes. I worked my passage from Australia to England; it took me 124 days.

Q. Before the mast? A. Yes.

Q. So that you know a good deal about shipping?

A. Yes, sir.

Q. You went over on the "Eugene"?

A. I was not at that time.

Q. She was all right?

A. Yes, that is what I supposed; that's what I told McFarland.

Q. That was at Comox?

A. At Alert Bay. I did not want to sign that paper at all; I told McFarland, I says, "Select other people; I am willing to go."

Q. You were willing to go on?

A. I was willing to go on with the "Eugene" and do duty as well as those fellows that had to get out.

Q. Now, who was it that asked you to go on the "Eugene" as watchman at Alert Bay?

A. The secretary of the committee.

Q. He was taking charge of the matter for the committee? A. Mr. Van Ness.

Q. The committee was taking charge of that matter, the committee for the passengers?

A. No, it was like this: We could not very well make out of course, we could not understand, in the first place, when the "Eugene" left us in Victoria, and then, furthermore, we could not understand very well what the reason was because it was kind of kept a secret, what the reason was that she broke loose on the coal bunkers in Comox, so Mr. Van Ness said at a meeting, "We don't know what to do at all, if Mr. McFarland will go and leave us, which he thought he would, and what we are going to do; we had better go to work and watch the "Eugene" and keep a good watch, so that we know what is going on and don't let anybody off the boat, and don't let anybody on the boat until we know what Mr. McFarland, as representer of the expedition, is going to do in that matter.

Q. The fact is, you had begun to lose confidence in these people, hadn't you, all of you?

A. Well, of course, after—

Q. They were going on in this mysterious way?

A. Yes, sir.

Q. Would not tell you why the "Eugene" broke loose from the "Bristol?" A. Yes.

Q. You all got tired of that? A. Yes.

Q. You said, we will take the matter in our own hands?

A. No, we did not say that; we only was going to see so that we would have witnesses to prove if something were to go on wrong, which we considered wrong.

Q. When the committee sent you over on the "Eugene," they told you what they sent you there for, did they not?

A. Well, they told us to keep an eye on everything that was going on.

Q. All the time she was in Alert Bay?

A. No, not all the time, we were relieved.

Q. Yes, but somebody was on her while she was in Alert Bay?

A. Yes, sir.

Q. For the purpose of watching her?

A. Yes, sir.

Q. You have not got a copy of this release that you signed with the "Bristol"?

A. No, sir, Mr. Johnson has got it; I think he can get it.

Q. Johnson was the man, then, that presented this release? A. Yes, sir.

Q. He was the purser of the "Bristol"?

A. Yes, sir. We did not know anything about Johnson at all in the question, not a word about him, but all at once, when he came back and went in Alert Bay, and we were talking to the captain as to what we were going to do, all at once this purser came up, this Johnson, as representer of the "Bristol."

Q. Then you all had a meeting about the release, before you signed it, I suppose? A. Yes, sir.

Q. The ninety passengers?

A. Yes, it was called by Mr. McFarland.

Q. And after you all had a meeting about it you came to the conclusion that you would sign it didn't you?

A. On the request of Mr. McFarland and this other captain, Mr. Lewis.

Q. So that you all agreed to sign it in the meeting, you were not going to sign it—one of you would not sign it unless the rest did?

A. One did not sign it and the purser told us that if one failed to sign it, he will turn off and go to St. Michael. And so they worked on that poor fellow for pretty near six hours—they were going to throw him overboard and was going to hang him up, and was going to force him to sign it, and he did not sign it.

Q. The other passengers wanted him to sign?

A. Yes, they wanted him to sign.

Q. What was his name?

A. He gave me his address; his name is N. M. Witt. He lived in the New Western Hotel on Third avenue.

Q. How does he spell it?

A. He has put it down here himself.

Q. That is "W. W. Wert."

A. Yes.

Q. Did he tell you where he came from?

A. No, sir.

Q. Mr. McFarland told you then that the "Bristol" had fulfilled her part of the agreement in taking you that far or was ready to fulfil her part?

A. I beg your pardon, Mr. McFarland did not take no personal interview at all; what he had to say he always called a meeting you know, and put that in front of the body.

Q. Then let them act as they would?

A. Told them simply how he felt about it.

Q. Well, after you had all that put before your committee, and you probably had another meeting of the passengers, you then decided to go to Victoria, did you not?

A. Mr. McFarland always was introduced to the meeting; he was always present at the meeting; of course, we did not want to do anything without having Mr. McFarland there, as he was introduced to us as manager of the "Eugene," and we didn't want to do anything without his knowledge.

Q. His wife was along too, was she not?

A. Yes, sir.

Q. She was a passenger, was she not?

A. That's the way I looked at it, so was his boy.

Q. She and McFarland and the boy all signed this agreement, didn't they?

A. I don't know whether the boy signed it.

Q. McFarland and the wife signed it?

A. Yes, sir.

Q. Just like any other passengers?

A. Yes, sir, just like any other passengers.

Q. Now, you bought two tickets from this man Gould?

A. Yes, sir.

Q. Besides the one which is placed in evidence here, there was another, which was taken up on the "Bristol?"

A. Mr. Gould gave me two tickets, and he told me that the way I understood it was this: That I had my tickets all right enough for the trip, and when I came over, that was the understanding, and when I came over to Victoria, I seen so many different kinds of tickets. Now, there were people from Portland and people bought tickets in Victoria, and had different tickets altogether, and then by talking around I went up to see Mr. Davidge, and he says, "How is that? That is so funny, so many different

kinds of tickets." "Well," he says, "of course, you have got to get these tickets exchanged," and he told us to come up at a certain time and get another ticket for the "Bristol," and then I got this little slip in exchange for the ticket.

Q. That is the one in evidence here?

A. No, beg your pardon,

Q. That is the "Eugene" ticket?

A. That is the ticket I got from Seattle, and this little slip I got exchanged for my other ticket, that I received in Victoria.

Q. The purser takes the ticket up, don't he?

A. Yes, sir.

Q. Did you ever ask Johnson for the ticket?

A. No, sir. There is quite a lot of people did not want to give up their ticket and they did not.

Q. I show you this ticket here, issued apparently to F. M. Lyon; was that the kind of a ticket you had on the "Bristol" and gave up to the purser?

A. To say the truth, I could not say if it is the same kind of a ticket or not.

Q. It looked like it, did't it? It was the same color?

A. It is too long ago; I could not recognize this ticket; that was simply a ticket like this.

Q. Do you remember what was on it?

A. I read the ticket. But it was too much—you know I'm German, I could not very well get along.

Q. But you had that ticket?

A. I read the ticket.

Q. You had that since you saw the sign down here at Gould's office, did not you?

A. I exchanged it for a ticket in Victoria.

Q. But the ticket you had in your pocket, have you seen that since you saw the sign down there in Gould's office, the little sign that you testify about?

A. Well, this was the ticket that was exchanged in Victoria; I did not see that sign afterwards.

Q. No, but you remember all there was on that sign down there, don't you?

A. Well, I just remember, I could not really—I knew it was for the trip, you know, but I could not—this was a ticket two feet long and one foot wide; I could better see what I saw on that, because there is too much on the small one.

Q. Does your memory depend on the size of the thing that you see?

A. Less letters; there was only a few letters on that you know.

Q. Do you remember all there was on that?

A. Well, I do not remember all that was on it.

Q. What you told on your first examination was not all that was on there then, was it?

A. Well, it was all what I understood was on it; it was the understanding that they said that I could secure a ticket there for St. Michael and Dawson City.

Q. That's all it did say? A. Yes, sir.

Q. Was that all that you saw on that sign, that you could get a ticket from that office from Seattle to St. Michaels and Dawson City.

A. Yes, sir.

Q. Now, did not that ticket that you got over there—you took your ticket up to Davidge & Company, did not you, and Davidge signed it?

A. I got a ticket which was signed all right; it seems to me a ticket I got was a little longer than this is.

Q. At all events, Davidge signed it?

A. Yes, I seen the signature underneath.

Q. Looked just like that, didn't it?

A. It's hard to tell.

Q. Now, let's get the straight of this: From Gould,

you got the yellow ticket here, that you put in evidence (referring to Libelant's Exhibit "K")?

A. Yes, that is my ticket.

Q. You also got another ticket?

A. I got a little ticket of about that square (showing); it was a white ticket.

Q. Now, this little square white ticket. When you got to Victoria, you took that up to the office of Davidge & Company? A. Yes, sir.

Q. And there they gave you another ticket?

A. Yes, sir.

Q. And that other ticket is the one that you gave to the pursuer on the "Bristol?" A. Yes, sir.

Q. Now, is not that the ticket that Davidge & Company gave you for the little square white ticket?

A. Well, it's what I say. I think really that my ticket was a little longer than this one.

Q. It looked very much like that, did it not?

A. Yes, sir.

Q. You could not say it was not like that?

A. I could not say.

(Paper identified by witness offered in evidence by claimant marked Claimant's Exhibit 1 and returned herewith.)

A. (Continuing.) Furthermore, I will state there were people bought tickets in Portland, who did not exchange their tickets at all; they only had one ticket and so on, and then when we got to Victoria we were surprised to see so many different kinds of tickets floating around; I never would have thought of going to work to exchange that ticket if I had not inquired in Davidge's office.

Q. And then Davidge told you that you ought to exchange it?

A. Yes, sir. I think, however, I would not have exchanged it; that it would have been just as well.

Q. Now, your outfit, you say, cost you $268?

A. Yes, sir.

Q. Where did you buy it?

A. I bought part of it in New York and brought it up here, and I bought part of it in Mr. Kline & Roseberg's, and I bought part of it in a secondhand shop down here on a little side street going down to the wharf, and I bought part of it in Cooper & Levy's.

Q. Well, this outfit was enough to last you for a year and a half? A. Yes, sir.

Q. It was not perishable stuff, was it—it was stuff that would last?

A. Oh, yes, of course, it would last.

Q. Now, in Victoria, how much customs duty did you pay on it?

A. We did not pay no customs duty on it at all.

Q. How much did you get for that when you sold it?

A. I got for the three outfits; I bought my two partners' outfits out; they were out of money.

Q. You bought your two partners out?

A. Yes, I got for the whole outfit $185 for the three of us. Of course, we didn't have no money to come back here to Seattle.

Q. What were their names?

A. There was Baker and Marcy.

Q. They were partners with you in this whole transaction? A. Well, we run together, you know.

Q. You were going to go into partnership up there in whatever you got?

A. No, sir.

Q. You did have money then?

A. Well, I had borrowed the money from Mr. Frieze in Victoria.

Q. You borrowed the money from him?

A. Yes, sir.

Q. Was he a man you knew before?

A. No, I made his acquaintance in Victoria.

Q. How much money did you borrow from him?

A. I borrowed $100.

Q. So that you could buy these outfits?

A. Yes, sir, and gave him the papers so that I could return the money.

Q. Well, you borrowed this money the $100, bought the outfits, and then you sold the whole three outfits for how much?

A. $185—I beg your pardon, that was the groceries.

Q. What did you do with the rest of the stuff?

A. Well, the rest I kept.

Q. You have still got that?

A. No, they kept it.

Q. You only bought their groceries?

A. Their groceries—that is all. Mr. Baker went up to Copper river and Mr. Marcy went home. He was short in money; he sold as quick as he could, so he sold his clothing—he sold that for to keep himself going.

Q. Now, you got back there at Victoria, early in September, didn't you? A. Yes, sir.

Q. There were other boats still going up to Alaska, were there not?

A. Not that I know of.

Q. There were other people still going into Alaska, over the Dyea and Skaguay trails? A. Yes, sir.

Q. Lots of them, were there not?

A. To go over across.

Q. When you got back here to Seattle there were still a good many people buying tickets and outfits to go up there, were there not?

A. Oh, yes, there were some of them.

Q. Did you try to sell your outfits to these people?

A. Yes, sir.

Q. To whom did you finally sell them.

A. Oh, there were several parties I tried to sell to at the hotel.

Q. Did you sell them to them?

A. No, sir.

Q. Where did you finally sell them?

A Well, after it was on the wharf for four days, I went over to inspect it, and it was damp weather like to-day, and the rats had eat holes in it, and I went back to Cooper & Levy where I bought it and offered him to take it back.

Q. He would not pay you as much as you got for it because it was not in good condition?

A. Oh, it was not in A No. 1 condition; it was just about the condition when we left.

Q. I thought you said that the rats had eaten into it?

A. Well, of course, that didn't do the goods any damage, you know. It was not damaged by water or damp weather.

Q. Did you try anybody else besides Cooper & Levy?

A. I tried several parties, outfitters.

Q. They would not, any of them, give you anything for it.

A. Well, they said this was not the stuff they wanted; they wanted other stuff, and then they wanted this and then they wanted that, and wanted stuff I didn't have, and what I had, they didn't want.

Q. What have you been doing since you came back from Victoria?

A. Nothing; I worked for one week.

Q. Here? A. Yes.

Q. What at?

A. Making cigars. I tried to get work, but it is impossible to get any work here.

Q. What other kind of work did you try to get?

A. Oh, any kind.

Q. Tried all around? A. Yes.

Q. Could not get any? A. Yes.

Q. Tell me some places you tried.

A. Well, of course, I did not want to try to get work which I cannot do, going out lumbering or that kind of work. I ain't used to that kind of work.

Q. Tell me some one you tried to get work from?

A. I inquired around wherever I thought there was a chance.

Q. Tell me some store or some lumber mill or some person that you went to to try to get work.

A. I had a conversation a couple of days ago with Mr. Levy, and Levy told me that if I could go to work and sell outfits that I could do so, and then I went to see Messrs. Kline & Rosenberg, and they said, "Well, Jacobi, if you want to make a few dollars, we will give you a chance to work for us, selling outfits."

Q. That is just a little while ago; just a few days ago?

A. That is weeks ago. But I tried to do it, but you cannot sell anything; the people are all too stupid here.

Q. The people are all too stupid; you could not sell anything?

A. They want to have their own ways, and as soon as you pitch in and want to get them some place, they think you are going to swindle them.

Q. Did you try to get any labor?

A. Well, I worked down there for eight days in that cigar shop. I had my back against a big stove, but my feet were nearly in the street—one side was roasted while the other was nearly froze to death. I worked for a week and I had to give it up.

Q. Where is that?

A. There is a little cigar store next a little shoemak-

er's store. This was a couple of weeks ago.

Q. Well, you took some money along with you up there?

A. No, sir, I had just $45 left.

Q. What security did you give this man in Victoria who made this loan to you?

A. My word.

Q. Your word?

A. Yes, he offered it to me, and I told him my plans, and he says, "Whenever you want any money, I will give it to you; I will help you out."

Q. He was a resident of Victoria, was he?

A. Yes, he owns the Queen's Hotel, where we used to board.

Q. You never met him before you were up there this time? A. No, sir.

Q. You just knew him while staying at his hotel—he is a German and you are a German? A. Yes, sir.

Q. He said, "Here's $100 if you want to buy the outfit"?

A. He did not say that. I told him all about it, and I had plenty of stuff up there, and I told him I was going to give him my watch, and I had a rifle, and I had a shotgun, and I had a pistol, and I had an instrument up there that cost me $50. And I says, "I will let you have that all for security, until I am able to pay you back." He says, "That is not necessary, Jacobi," he says, "I will take your word for it and here's the money."

Q. After you got back to Victoria, did you ever go to see Mr. Gould or Mr. McGuire, and tell them that you had signed this release to the "Bristol," under protest?

A. No, sir.

Q. Did you ever make any claim against the "Bristol" or against the owners?

A. We did when we got back, when this committee

started in an action, they engaged lawyers and other people engaged lawyers, and we engaged lawyers, by paying 50 cents and a dollar apiece, and tried to do the best we could, and then the committee started to go to work, and the committeeman left us, and some bought horses and some went up to the Stickeen, some went to Dyea, and within a couple of days they were all scattered.

Q. These men who went to the Stickeen river and Dyea, they were going over to Dawson City, were they not?

A. That was their intention.

Q. So that from that time, until you began this suit, you never said anything more about the release of the steamer?

A. No, sir, because they all said that we shall leave it to the committee and stick to the committee, and we stuck to the committee until we were struck by the committee.

Redirect Examination.

Q. (By Mr. HOGAN.) Now, as to the signing of that release by McFarland, do you know on whose behalf he signed that, whether on his own or on behalf of any other person?

(Objected to by proctor for claimant as incompetent, irrelevant, and immaterial.)

A. He signed that release in his own behalf; that's the way it seems to me.

Q. I will ask you whether or not the Portland and Alaska Trading and Transportation Company signed that release.

A. If Mr. McFarland signed that release, consequently, as the manager of that Portland Transportation Company, it must mean the company.

(Proctor for the claimant moves to strike out all of the testimony of the witness in regard to any conversations or representations or saying or acts of McFarland which he has testified to, or of McFarland, McGuire, Gould, or Lewis, as no proper basis has been shown for such testimony, no connection of these people with the claimant or the steamer "Eugene." At this time, further proceedings were adjourned until 10 o'clock A. M., November 15th, 1897.)

Seattle, November 15th, 1897. 10 o'clock A. M.

Continuation of proceedings pursuant to adjournment.

Mr. C. W. GOULD, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (By Mr. HOGAN.) What is your business, Mr. Gould?

A. I am a dealer in typewriters.

(Proctor for libelant desires the record to show that he is examining this witness as an adverse witness.)

Q. Have you any other business in connection with that? A. Well, no.

Q. Have you had of late?

A. Not since some time in August.

Q. Do you know of the steamship "Eugene?"

A. I do.

Q. Of the "Bristol?" A. Yes, sir.

Q. Do you know of their attempted voyage to Alaska last August? A. I do.

Q. Did you have any connection with that?

A. Yes, I acted as agent in selling tickets.

Q. What place?

A. 619 First Avenue, Seattle.

Q. Under what name—C. W. Gould & Company?

A. No, sir.

Q. Just C. W. Gould? A. C. W. Gould

Q. You are the Mr. Gould testified to by the witness Jacobi, and Ruff, to the effect that they had bought their tickets of you, I presume?

A. I remember of Mr. Ruff buying a ticket of me; the other party I do not recollect. I presume that I sold the other party a ticket; if I did his name will appear on the stub of the ticket but I do not place him in that connection.

Q. By whom were you employed in that business?

A. As near as I am able to make out, I was employed by McGuire & Davidge.

Q. Who is McGuire and what relation does he bear to the Portland and Alaska Trading and Transportaion Company, if you know?

(Objected to by proctor for claimant until the witness states that he knows.)

Q. I ask him if he knows.

A. I do not know.

Q. You had dealings with him, he representing the Portland and Alaska Trading Company?

(Objected to by proctor for claimant as leading.)

Q. In what capacity did he assume to represent that company in these dealings?

(Objected to by proctor for claimant, because any such statements to the agent cannot establish as against the principal the agency.)

A. Why, I believe P. H. or H. P. whichever his initials may be, was president of that company; that was my recollection.

Q. And W. W. McGuire, what relation did he bear?

A. If I recollect correctly, he was secretary.

Q. And McFarland, what were his initials?

A. E. B., I believe.

Q. What relation did he bear to the company?

A. I believe he was manager.

Q. Did you have any stationery or printed matter furnished you by them? A. No, sir.

Q. Did you see any of their letterheads or business cards? A. I did not.

Q. Who was present when you were employed for the purpose of selling tickets on this voyage?

A. I believe Mr. Giles was in the office at the time with H. P. McGuire, and H. C. Davidge came in together and asked me if I would act in the capacity of agent in selling tickets.

Q. You made a contract with them, did you?

A. I did not, no, sir; only verbal.

Q. You made a verbal contract at that time?

A. Yes, sir.

Q. Whereby you were to act as agent for the selling of tickets for this voyage? A. Yes, sir.

Q. What was said as to the amount to be charged passengers for the tickets?

A. We were to charge them $300 from Seattle to Dawson City.

Q. And what privileges as to baggage and freight was that to include?

(Objected to by proctor for claimant os leading.)

A. That was to include 1500 pounds, as I understood it, or three-quarters of a ton, measured. Now, there is a difference between 1,500 pounds avoirdupois and three quarters of a ton measured; well, that matter was threshed out between the parties before the sailing, and it was finally agreed that 1,500 pounds avoirdupois should govern.

Q. What date was this that you were employed by them in the capacity of agent?

A. Well, now, I do not recollect exactly; it was somewhere about the 14th of August, I think.

Q. State whether or not any bills were gotten out and distributed and circulated, advertising this trip.

(Objected to by proctor for claimant as leading.)

A. Yes, sir, there were cards printed on ordinary paper about the heft of thick letter paper.

Q. Have you any of these cards?

A. I have not.

Q. What was done with these cards—were they put up at any place?

(Proctor for claimant objects to this line of inquiry as incompetent, for the reason that no authority has been shown in this witness to bind the owners of the "Eugene" or the claimant.)

Q. I ask you if they were distributed or put up anywhere?

A. Yes, they were handed to outside rustlers to give to passengers or prospective passengers.

Q. State whether or not these cards were printed with the approval of the McGuires.

A. They were.

Q. Were they submitted to them?

(Objected to by proctor for claimant as incompetent until the card is produced. Proctor for claimant proposes to show that the cards have been destroyed and will offer secondary evidence as to their contents.)

Q. Now, you may go on and state what part the McGuires or McFarlands had in the preparation of these advertisements—what part they took in it and whether they were submitted to them.

A. They were written by me and submitted to W. W. McGuire; I believe he was in the office at the time. He stated that he would have to have some cards for these outside rustlers to hand to passengers, and wanted me to get up a form. So I wrote out a form and submitted

to them or to McGuire one, whoever was in the office at the time, and he told me to get them printed.

Q. Then you had them printed.

A. I had them printed, yes.

Q. Was one of them posted up in your office or about the office anywhere, if you remember?

A. I do not recollect of any that were posted up at all. They were little bits of cards about three inches by two and a half, something like that—small cards.

Q. I will ask you if this is one that you refer to?

A. Yes, that is the one.

(Card offered in evidence by proctor for libelant. Objected to by proctor for claimant as incompetent, and on the same ground heretofore stated; that there is no authority shown for the issuance of this by the claimant or owners of the steamer "Eugene." Paper marked Libelant's Exhibit "M" and returned herewith.)

Q. I will ask you whether or not there was any other large bill printed about a foot wide and two feet long.

A. Yes, sir.

Q. I will ask you whether or not that was printed with the knowledge and approval of the Portland and Alaska Trading and Transportation Company or the McGuire's?

(Objected to by proctor for claimant as leading and calling for a conclusion of law.)

A. It was printed with the knowledge of W. W. McGuire, and I think with the knowledge of H. P. McGuire, although he may not have been here at that time.

Q. How was that prepared, who prepared it and to whom was it submitted?

A. I do not recollect the gentleman's name who prepared the card; I think it was prepared by an old gentleman on Cherry street, between Second and Third.

Q. Who employed him for the purpose?

A. I believe W. W. McGuire; that is my recollection.

Q. State what was done with that bill after it was printed as to its distribution.

A. It was nailed upon my bicycle rack.

Q. Where is that with reference to the entrance to your office?

A. It is right by the side of the door, in front of the window.

Q. Now, do you know anything about any advertisements or publications having appeared in the daily papers of this city with reference to this voyage?

A. Yes, sir. There were several barnstorming articles in the "P. I.," what would commonly be called 'jollies' by some people; that is what the McGuires called them.

Q. I now hand you Libelant's Exhibits from "B" to "J." I will ask you if you recognize these as some of the articles printed matter, newspaper matter, that were so published.

A. Here is one in particular, where it says "Secretary W. W. McGuire, the resident agent Gould of the company, were about the busiest men in Seattle yesterday, attending to the wants of passengers, and looking after the new arrivals who are booked for passage on the "Bristol." That is what I referred to as "barnstorming" As a matter of fact that day we had very little business.

Q. That is Exhibit "D" that you have read from. Now I will ask you if you have examined all these papers, and if you have, whether you can state whether these are the articles that you refer to as appearing in the "P. I."

A. Yes, sir. Let me state here. There is a list of passengers, and some of the passengers came in and objected to this list, as it was misleading on account of quite a number of the passengers having been booked at Port-

land, and it was made to appear that the passengers were all from Seattle.

Q. You speak of Exhibit "G" now?

A. Yes, sir.

Q. Now, I will ask you to explain how these articles came to be published in the "P. I." of this city, by whom they were written, if you know, and at whose request?

(Objected to by proctor for claimant unless the witness knows of his own personal knowledge.)

A. I saw some of the articles that were being prepared by W. W. McGuire. Others were written by a gentleman by the name of Semple, at Mr. McGuire's request, and they went over the matter in my office there a number of times, approving and disapproving it, before it was submitted for publication. That's all I know about it. McGuire, however, asked me several times to assist him in writing up that matter, but I did not think that it was in my line, and did not wish to have anything to do with it.

Q. Who paid Semple for preparing this, if anybody?

A. I don't know who paid him.

Q. I will ask you whether or not he got passage on this voyage for writing.

(Objected to by claimant as leading.)

A. He had passage on the voyage, and I understood at reduced rate on account of services performed and to be performed.

Q. (By Mr. PETERS.) That is what you understood from some one else.

A. I understood it from W. W. McGuire.

(Proctor for claimant moves to strike out the testimony as hearsay.)

Q. (By Mr. HOGAN.) W. W. McGuire told you so?

A. Yes, sir, he did.

Q. Now, do you know whether or not the "P. I." Company was paid anything for the publication of these articles?

A. I paid the "P. I." $100, and took a receipt for it.

Q. For the publication of these articles?

A. Yes, one payment. I don't know what was paid subsequently.

Q. State whether or not the McGuires had knowledge of that payment or whether it was by their request.

A. Yes, sir, they had. They requested me to pay the bill, and I refused until I had authority for the disbursement from F. C. Davidge & Company.

Q. Then what money did you pay out—where did you get the money that you paid with?

A. I received it from the sale of tickets.

Q. That you received a receipt for that payment?

A. I have.

Q. Have you that receipt with you?

A. No, sir, I have not.

Q. Where is it? Can you get it?

A. Yes, sir, it is in my safe at the office.

(Receipt referred to by witness subsequently produced, to which is attached a telegram of which the following are copies:

(On Pacific Postal blank.)

Victoria, B. C., Aug. 19th, '97.

C. W. Gould, Seattle, Wn.

Please pay the "Post-Intelligencer" one hundred dollars immediately account advertising. Your form local ticket approved.

F. C. DAVIDGE & CO.

Seattle Washington, Aug. 19, '97.

C. W. Gould, Acct of F. C. Davidge & Co.

To "Post-Intelligencer" Publishing Compnay, Dr., on acct of adv., $100.00

P. I. Co.

Per J. Ira Hawley.

(Proctor for libelant offers in evidence the receipt and telegram as above. Proctor for claimant objects to the reecipt as incompeteut,for the reason that there is no connection shown between the claimant and the parties to this transaction.)

Q. I will ask you if you have any telegrams or letters in your possession between yourself and other persons, relating to either of these steamers, concerning this transaction, and if so, I will ask you to produce them.

A. I have. Here are some that are addressed to McGuire and some to myself.

Q. I will ask you where these were received.

A. In my office.

Q. And at what dates? At the dates they purport to bear? A. Yes, sir.

Q. I will ask you whether or not they have been in your possession ever since. A. Yes, sir.

(Proctor for libelant offers in evidence six telegrams produced by the witness. Proctor for claimant desires to ask some preliminary questions as to the competency of the telegrams.)

Q. (By Mr. PETERS.) This telegram from McFarland to H. P. McGuire dated August 23, 1897, have you got the answer to that telegram with you?

A. I have not.

Q. Or a copy of the answer?

.A That was addressed to McGuire?

Q. Yes. A. No.

Q. There was an answer to it?

A. I could not say.

Q. Where did you get that, then?

A. Well, McGuire left it on my desk.

Q. McGuire left it on your desk and you picked it up?

A. Yes sir.

Q. Did you have McGuire's authority for the use of this?

A. He turned it over to me. The message was opened by him, and handed over to me; all the messages there were left in my care and put in my safe.

Q. Where was McFarland at that time?

A. I don't know.

Q. Where did this telegram come from?

A. It was dated at Portland.

Q. That is, McFarland must have sent it from Portland? A. Yes, I think so.

Q. You have not the answer to the telegram?

(Proctor for claimant objects to the introduction of this telegram as being fragmentary evidence, besides the further objection to the introduction of all these telegrams and letters as being incompetent, on the ground that no connection is shown between those who signed them with the owners or claimants of the steamer "Eugene.")

Q. Now, this telegram from Victoria, B. C., August 19th, from F. C. Davidge & Company to W. W. McGuire, where is the answer to that telegram?

A. If there is an answer at all, it must be with the Postal Telegraph. I do not know whether it is answered or not.

Q. It was received at your office, was it not?

A. Yes sir.

Q. Do you keep a copy of your answers there?

A. No, sir, I did not.

Q. It doubtless was answered, was it not?

A. That I could not say.

(Proctor for claimant objects to all of the telegrams as they all appear from the face of the telegrams to require answers, and the evidence is not admissible, unless they produce the balance of the communications. Papers marked Libelant's Exhibit "N," "O," "P," "Q," "R," and "S," and returned herewith.

Q. (By Mr. HOGAN.) You have identified these letters? A. Yes, sir.

(Proctor for libelant offers in evidence letter from F. C. Davidge & Company to C. W. Gould, under date of September 24th, 1897; also letter from F. C. Davidge & Company, dated Portland, Oregon, August 17th, to C. W. Gould; also letter from F. C. Davidge & Company, Victoria, dated August 20th, to C. W. Gould.

Q. (By Mr. PETERS.) Mr. Gould, this letter purporting to be from Davidge & Company addressed to you from Victoria, B. C., on the 21st day of September, 1897, says, "We are in receipt of your favor of the 22d, and will of course be glad if you are able to recover the $35 from the McGuires"; have you got your letter of the 22d to which this is the reply? A. No, I have not.

Q. Have you got a copy of it?

A. I do not think I have.

Q. Do you not keep letterpress copies of the letters which you write in your office?

A. The majority of them. Some I do and some I don't.

Q. What makes you think you have not got these?

A. Well, I am not positive that I have not; I may have.

Q. This letter of the 20th of August, 1897, purporting to be from F. C. Davidge & Company to you, says, "We

note you paid the "P. I." the $100 which was in order." That must have been in answer to a letter of yours informing them, among other things, that you had paid the $100 to the "P. I.," is not that true? A. Yes, sir.

Q. Have you got that letter?

A. I presume I have a copy of it; I am not positive of that. It may have been a telegram. In that case, I did not keep copies of telegrams.

(Proctor for claimant objects to the introduction of these letters on the ground that they are incompetent, and on the further ground that there is no showing of authority in Davidge & Company to bind the owners or claimant of the "Eugene"; and further that the signature of Davidge & Company is not proven; and further that the letters show that they are in answer to other letters from the witness to Davidge & Company, if genuine at all, and unless these other letters are produced, to which these are answers, or which were answers to them, we object to these as fragamentary testimony.)

Q. (By Mr. HOGAN.) I desire to ask one or two questions in view of the objections. Do you know the signature, Mr. Gould—that is, you had business correspondence with them? A. Yes.

Q. Other than this?

A. Very little. I could not take my oath that I could recognize the signature.

Q. But you received these letters in the regular course of business? A. Yes, sir.

Q. Can you identify the signature to these letters of Davidge & Company, according to the signatures to other letters received by you?

(Proctor for claimant objects to the question as incompetent, and in no way tending to prove the genuineness of the signatures.)

A. As far as I am able to judge, the signature is the

same as on previous correspondence. As you will note, one of these letters is dated Portland.

Q. They had an office in Portland?

A. They had a branch office in Portland, consequently the signature by the party signing the letter "G," down there, would not be the same as the signature from the home office at Victoria.

Q. (By Mr. PETERS.) Who is the individual who signs the name Davidge & Company by the name "G"?

A. I think his name is Grear.

Q. Did you ever see him write?

A. No, I never have.

Q. Who is the individual who signed the letters over in Victoria, B. C., under the name of Davidge & Company.

A. I think it is Davidge himself.

Q. Did you ever see him write his name?

A. I never did.

(Proctor for claimant renews his objection as incompetent, the genuineness of the signature not being proven.)

Q. (By Mr. PETERS.) One of these letters that was handed you by Mr. Hogan was in the possession of Mr. Hogan, was it not?

A. Since I came in the office this morning, he handed it to me.

(Papers identified by witness marked Libelant's Exhibits "T," "U," "V," and returned herewith.)

Q. (By Mr. HOGAN.) I will ask you if you recognize the signature of F. C. Davidge & Company to that letter, according to the signature borne by the letters of your correspondence with that firm.

(Objected to by proctor for claimant, for the reason that it will in nowise prove the genuineness of the signature.)

A. The signature to this letter appears to be the same as on the other letters from Victoria, signed by Davidge & Company.

(Paper offered in evidence by proctor for libelant.)

Q. (By Mr. PETERS.) That is the only ground of belief as to its genuineness, because it seems to be on the same sort of paper.

A. The letterhead.

Q. It seems to be the same sort of a signature as on these other letters that have been offered in evidence?

A. Yes, sir.

(Proctor for claimant objects to the introduction of the letter as incompetent, the genuineness of the signature not having been shown, and the witness not appearing to have any knowledge as to the handwriting. We object on the further ground that it relates to other correspondence and to other matters, and the balance of the correspondence has not been produced; and on the further ground that it relates to transactions which have arisen since the commencement of this suit, the letter being dated November 8th, 1897, and it further appears that it is a letter from F. C. Davidge & Company to J. C. Hogan. Paper marked Libelant's Exhibit "W" and returned herewith.

Q. (By Mr. HOGAN.) I propose to follow this up by another witness. As such agent for this expedition, Mr. Gould, I will ask you whether or not you sold the ticket to Charles Ruff, one of the libelants in this case.

(Objected to by procter for claimant as leading.)

A. By reference to my stub-book, I can answer that question.

Q. Please do so. A. Yes, sir, I did.

Q. On what date?

A. I haven't the date; the tickets were not dated.

Q. Where was that sold?

A. At my office in Seattle.

Q. He paid the passage money?

A. He did, yes.

Q. How much? A. $300.

Q. What transportation rights did that entitle him to?

(Objected to by proctor for claimant, for the reason that the ticket is the best evidence.)

Q. What was said as to transportation rights that were to be given him, between what points and as to what freight he would be entitled to carry with him?

(Objected to by proctor for claimant as incompetent.)

A. He was told that he would be entitled to through transportation from here to Dawson City.

Q. (By Mr. PETERS.) Mr. Gould, the ticket which you sold Mr. Ruff had the terms and conditions of the transportation upon it, didn't it?

A. The order for the ticket on the "Bristol," from Victoria to St. Michaels.

Q. Have you got a copy of that order there?

A. I have.

Q. That was what was delivered to Mr. Ruff, when he paid his $300? A. That is the order.

Q. For a ticket on the "Eugene"? A. Yes, sir.

Q. Now, these two papers, that is, the order for a ticket on the "Bristol" and the ticket on the "Eugene," contains the conditions of the transportation; that is it has a stipulation on it as to the amount of baggage and so forth? A. Yes, sir.

(Proctor for claimant objects to any parol testimony, which attempts to vary the contract contained on the ticket.)

Q. By Mr. HOGAN.) Between what points would that furnish him transportation, and what baggage or other rights did it give him?

A. It furnished him—we sold the ticket or furnished

a ticket from Seattle to Victoria on the "Kingston," I believe, or the "City of Seattle," the boats running between here and Victoria, I don't know the name of the company operating that boat, but we furnished the transportation between here and Victoria. Between Victoria and St. Michaels we furnished an order on F. C. Davidge & Company covering the transportation between Victoria and St. Michaels. The ticket for passage on the "Eugene" was also given the passengers here, and the order on F. C. Davidge & Company.

Q. Can you tear one out?

A. Yes, I will furnish you one of the orders and mark the stub.

(Proctor for libelant offers the paper in evidence. Paper marked Libelant's Exhibit "X" and returned herewith.)

Q. Can you furnish a ticket to the "Eugene"?

A. I can, but I may be called upon to account for it.

(Witness produces blank ticket to commissioner indicating upon the stub the purpose for which the ticket was detached. Proctor for libelant offers the ticket in evidence. Proctor for claimant objects as incompetent, for the reason that it is not connected in any way with the owners or claimant of the "Eugene." Paper marked Libelant's Exhibit "Y" and returned herewith.)

Q. Now, these two pieces of paper were given to the passengers when they paid the passage money. You mentioned something about furnishing them transportation from Seattle to Victoria?

A. There was a card, a ticket calling for regular transportation, first class passage on the boat between Seattle and Victoria, which was supposed to be a part of the continuous passage.

Q. That was all included and paid for in the sum of $300? A. Yes, sir.

Q. I will ask you if you also sold tickets in the same manner for passage in the same manner to Gustav Jacobi, another of the libelants here?

A. Gustof Jacobi.

Q. And Fred M. Lyons? A. F. M. Lyons.

Q. I will ask you if you also sold him a passage in the same manner? A. Yes, sir.

Q. What amount did he pay for it? A. $300.

Q. On this same voyage? A. Yes ,sir.

Q. And under the same circumstances?

A. Yes, sir.

Q. And W. Cary? A. W. Cary.

Q. You sold him passage from Seattle to Dawson City on this voyage? A. I did.

Q. What amount did he pay for it? A. $300.

Q. Mr. McKnight? A. E. W. Knight

Q. What did he pay for his? A. $300.

Q. And these received such papers as you gave to Mr. Ruff? A. Yes, sir, they did.

Q. Now, at the time these tickets were sold, was there any officer of the Portland and Alaska Transportation Company present in your office?

A. I cannot say whether he was present at that particular time or not, but one of the McGuires was there nearly all the time.

Q. Which one of them?

A. W. W. was there the greater part of the time.

Q. I will ask you whether or not when these tickets were sold, the manner of making the voyage was explained to the passengers? A. It was.

(Objected to by proctor for claimant because the tickets themselves contained the stipulations in regard to transportation.)

Q. Did they make any inquiries as to how the expedition was to reach Dawson City?

A. They wanted a general outline of what they were expected to do.

(Proctor for claimant objects for the reason that the inquiry should be directed to the particular libelants, and not what was said to the passengers generally or out of their presence.)

A. They wanted us to outline the proposition.

Q. How the boats were to sail?

A. How they were to sail and give them all the information that we could in regard to the matter.

Q. And what were they told as to the manner of the sailing of the boats and from what points they would sail?

A. They were told that they were to take the "Kingston" or "City of Seattle" from here to Victoria, where they, together with their baggage, would be placed on board of the steamship "Bristol" which would take in tow the "Eugene."

A. Yes, from that point or the original intention was to sail from Comox with the "Bristol," but that was changed and the "Bristol" came down to Victoria and took the passengers and freight there.

Q. With the "Eugene" in tow?

A. The "Bristol" was to pick up the "Eugene" at whatever point she might be at the time of sailing and take her in tow.

Q. The idea was to pick her up and place her outside of British waters?

A. I believe that was the reason for their not having her in Victoria, was to avoid customs officers.

Q. Now, what were they told as to the delivery of their baggage?

A. They were told to place it on the wharf.

Q. At what place?

A. Yesler wharf, and get receipts in the regular way.

Q. Who was to take charge of it at that point?

A. They were to get receipts from the wharfinger.

Q. Was that to end there?

A. That was to end their responsibility, so far as their baggage was concerned until they arrived at Dawson City.

Q. (By Mr. PETERS.) Mr. Gould, do I understand this was told by you to the passengers generally?

A. It was told by the McGuires and myself, yes.

Q. So that what you have been testifying to, some of it was at times told by you and some of it by the McGuires?

A. Yes, any inquiries to me that I did not understand fully and had not been fully instructed on, I would refer the passengers to Mr. McGuire and he would answer them.

Q. And he would do so sometimes in your hearing and sometimes not? A. Yes sir.

(Proctor for claimant objects to the testimony of the witness as being at least partly hearsay, and moves to strike out all the testimony of the witness in regard to any conversation or admissions, or letters or telegrams or representations of W. W. McGuire or P. H. McGuire, or E. B. McFarland or Johnson the purser or other parties about which he has testified, no connection having been shown between these parties and those which are competent to bind the owners of the steamer Eugene.)

Cross-Examination.

Q. (By Mr. PETERS.) Now, Mr. Gould, you have been a resident of Seattle for a long time, have you not?

A. In the neighborhood of three years.

Q. And your business has been that of selling typewriters? A. Yes, sir.

Q. Any other business?

A. Well, I was handling safes for the Webb Safe & Lock Company.

Q. As their local agent or general agent?

A. As their local agent.

Q. How long ago? A. Two years ago.

Q. Your office you say is 619 First avenue?

A. It is now.

Q. In what building?

A. Starr-Boyd.

Q. Was it in that building at the time of the sales of these tickets? A. Yes sir.

Q. What floor? A. First floor.

Q. You have stated that Mr. McGuire was the president of the Portland and Alaska Transportation and Trading Company and W. W. McGuire was secretary and McFarland was manager.

A. That is my understanding.

Q. From whom did you understand that?

A. From the McGuires' general conversation in regard to the company and so forth.

Q. You never understood it from anybody else excepting the McGuires or McFarland.

A. I believe that Mr. Greer from Portland, who went up to Victoria during the time that the passengers were being delayed there—he came through here and I believe that he told me that that was the relation they bore to the company.

Q. Who was Mr. Greer?

A. He was Davidge's agent at Portland.

Q. What was Davidge & Company?

A. They were supposed to be the people who had the Bristol.

Q. I am not asking as to that, but I am asking whether it is a corporation or a copartnership.

A. With the McGuires?

Q. Now who constitutes Davidge & Company?

A. I don't know, who the company is, but I have seen F. C. Davidge.

Q. You have seen F. C. Davidge himself?

A. Yes, sir.

Q. Where did you see him?

A. I saw him at the time he came down here to arrange the business.

Q. With you? A. Yes.

Q. So that it was Davidge who employed you?

A. Davidge and McGuire came in the office together, and they both seemed to be mutually arranging it in some way.

Q. Now, what was your compensation in this matter?

(Objected to by proctor for libelant as incompetent, irrelevant, and immaterial.)

A. Four per cent of the passenger tickets.

Q. Of the gross receipts?

A. Gross receipts of the passenger business, I had no percentage on freight.

Q. With whom was that arrangement made?

A. With H. P. McGuire with F. C. Davidge.

Q. Now, you retained that out of the money you received for the sale of tickets? A. I did.

Q. All moneys you received from the sale of tickets, you have since deposited in banks?

A. Yes, sir.

Q. And you never have had any accounting with the McGuires or the Portland and Alaska Trading and Transportation Company or Davidge & Company?

A. I sent them statements, that is, you might say that I have had an accounting because I itemized everything, I made statements, but they have never checked my vouchers.

Q. To whom did you send that?

A. I gave E. B. McFarland a copy and mailed a copy to Davidge.

Q. How long ago was that?

A. When McFarland was over here, during the time of the sale of tickets, was when I made out my first statement. The last statement or the final account either the copy or the original, was given to one of the McGuires, and the other mailed to Davidge.

Q. About how long ago was that?

A. Well it was after the sailing of the boat, I believe.

Q. About how much did you receive in commissions?

(Objected to by proctor for libelant as irrelevant, and immaterial.)

A. I do not recollect.

Q. About how much?

A. About five hundred dollars I think.

Q. Do you remember what appeared on that poster that was on your bicycle rack? A. No, I do not.

Q. Did you get a copy of it? A. No, sir.

Q. Did you get that yourself?

A. No, I did not keep it.

Q. Do you recollect what became of it?

A. It was destroyed with a lot of other rubbish there in the office at the time we cleaned it up to get it out of the way.

Q. Has anybody ever inquired about it since?

A. Not to my recollection.

Q. These advertisements in the newspapers that you refer to you say they were all in the Post Intelligencer?

A. Why, all that I noticed I believe were.

Q. Well, were there any other advertisements besides those which you have offered in evidence here?

A. That I do not know.

Q. Do these clippings which you have offered in evidence here include all the advertisements in that time?

A. That is more than I can say. I do not often read the advertisements—I did not often read all the advertisements that were in the "P. I." I was very busy at the time.

Q. The only one that you can recollect reading is this one that you refer to which says that W. W. McGuire and resident agent Gould of the company were about the busiest men in Seattle yesterday?

A. Yes, I thought that was a pretty big "jolly" at that time, because we were not very busy that day.

Q. That is the only one you really recognized as having seen in the newspaper and was written by one of the McGuires? A. I can recognize others there.

Q. Just point to some others and tell me who wrote them.

A. I think this one marked Exhibit "G"; I think that was written by McGuire and Semple.

Q. Who was Semple?

A. He was one of the passengers.

Q. What makes you think it was written by McGuire and Semple?

A. Because I remember he was asking me for a list of the passengers, trying to get a list of the passengers and a list was made up for the "P. I."

Q. Did you actually see the article before it was published? A. I heard them read it.

Q. Now, these letters and telegrams which you have offered in evidence as being received from the McGuires and McFarland, purport to be received from Davidge & Co. Have you got the letterpress copies of all the correspondence that went from you or from the McGuires through your office, to Davidge & Co.?

A. I do not know whether I have or not; some might have been telegrams. I was very busy at that time and worked early and late, and hardly had time to write any letters, and if I did, the chances are that I may have just thrown it in an envelope and sent it without copying.

Q. You keep letterpress copies in your office?

A. I do, yes, sir.

Q. Well, will you be kind enough to bring up the letterpress copy books after lunch in which you would have any copies of letters to Davidge & Co. or with either of the McGuires, or McFarland or Johnson, or any matter relating to the "Eugene"?

A. Yes, I can bring them up, if required to do so. I do not like to have the books put in evidence for I need them.

(At this time hearing adjourned to 1:30 P. M.)

Afternoon session. Continuation of proceedings pursuant to adjournment at 1:30 o'clock.

Mr. C. W. GOULD, on the stand for further cross-examination.

Q. (By Mr. PETERS.) A great many of these tickets were sold through brokers, were they not?

A. Why, through outside men that were appointed by Mr. W. W. McGuire and H. P. McGuire.

Q. Well, these men got a commission on each of them they sold, did they not? A Yes, sir.

Q. They were men who might be called ticket brokers or scalpers? A. I called them outside rustlers.

Q. Now, about how many of these tickets do you suppose, of the three hundred tickets, were sold in that way?

A. I do not know; it shows in my report.

Q. Well just an estimate, could you give what proportion?

A. I presume the commissions would amount to something in the neighborhood of five hundred dollars, maybe more.

Q. Well, how much would that indicate, then?

A. They gave them six per cent on whatever business they brought in.

Q. So that each ticket selling for three hundred dollars, six per cent of the gross amount of tickets sold by the outside rustlers would be represented by the five hundred dollars—that is your idea?

A. That is an estimate.

Q. Now, do you know whether a ticket was sold to Ruff or Jacobi by outside rustlers or whether they were sold in the office?

A. I can tell by that statement; my stub, I think, will show. I can tell by my statement in this letter-book. (Examining letterpress book.) H. C. Smithson received $18 commission.

Q. How about Jacobi?

A. I do not think there was any commission paid on Jacobi.

Q. But the ticket to Ruff was sold by outsider rustlers and the commission paid?

A. Yes; that was H. C. Smithson. I furnished all the tickets and received my commission on them, too.

Q. Now, all of your statements of disbursements made and amounts received for the sale of tickets were rendered by you to Davidge & Company, in Victoria?

A. Also to the McGuires.

Q. You do not find, then, any copies of letters which you sent in answer to these letters which you have introduced in evidence, that of August 17th?

A. What does that refer to—that letter does not state it is in answer to any of my letters, and I do not think I had written these people prior to that time.

Q. You do not think that was in response to any of your letters—that was a letter from Portland, August 17th? A. Yes, sir.

Q. Now, have you got that letter of the 22d of September to which Davidge has apparently referred in the letter of September 24th? A. No, sir.

Q. You see that he says in that that they have received your favor of the 22d, and will be glad if you are able to recover the thirty-five dollars from the McGuires. What was the controversy that you had with the McGuires?

A. Why the McGuires went down to the agent of the steamboat company, to the Kingston, and secured berths for 35 passengers, agreeing to pay for them, and I was trying to protect Mr. Pope, who is cashier of the steamboat company, by deducting that amount from the receipts for the tickets.

Q. And Davidge & Company would not have it?

A. Davidge & Co. thought that that was a matter that McGuire ought to take care of.

Q. So they insisted on your paying them $35 which you held out?

A. No. They had drawn out the $35.

Q. You wanted them to return it?

A. I wanted them to return it so that I could pay that bill.

Q. They insisted on retaining it and they did retain it? A. No, they returned it to me.

Q. Now, they say here that they are sorry to see that they (the McGuires, I suppose) are trying to make trouble for you? A. Yes, sir.

Q. He says further that it is the McGuire people who should furnish the bonds that you require. What was that?

A. Several of the passengers or the McGuires themselves, I think, came to me and said that the passengers intended to have all those who participated in the sale of tickets and that were in anywise interested in this expedition, in the way of agents, arrested for embezzlement Well, I knew if I was arrested on that charge, along with the rest of them, I would either have to go to jail or furnish bonds and I asked Davidge, in case that was done, if he would go on my bond, and that is what that matter refers to.

Q. Now, the passengers did complain to you and to others who had sold tickets and had been instrumental in getting them to take this trip on the "Bristol," they did make complaints to you of their treatment, did not they?

A. There were several of the passengers in to see me, but there was none of them that said they blamed me in the least.

Q. But they did make complaint of the agents generally, who sold them the tickets?

A. Yes, they seemed to be making complaints of Davidge and McGuire.

Q. There was a good deal of outcry among them against Davidge and McGuire? A. Yes, sir.

Q. Of their unfair treatment in having bought these tickets and not having completed the trip?

A. Yes, sir.

Q. They expected to hold the agents liable?

A. They expected to hold the owners of the boats liable.

Q. Well, did they threaten to arrest you and Davidge and the McGuires, and anybody who were instrumental in selling the tickets?

A. That came to me indirectly, so I could not say whether there was any truth in the report or not.

Q. But you believed it at all events?

A. I thought it may be possible.

Q. Now, the arrangement about these boats, Mr. Gould, as to the manner of their going up there, was that the "Bristol" should be coaling at Comox and the passengers should be taken over there from Victoria?

A. That was the original arrangement, I believe.

Q. And the "Eugene" was to go up from Portland to be towed up from Portland to Port Angeles, and then be towed up there to join the "Bristol" at Comox and the "Bristol" to take her on up to St. Michaels?

A. That, I believe, was the original plan.

Q. Now, that was communicated to you, was it not?

A. Yes, sir.

Q. And that was your information when you commenced selling tickets to passengers?

A. It was when I started in selling tickets.

Q. Now, that is contained in this statement, which purports to be from Davidge to you (referring to exhibit "T") this letter of August 20, 1897?

A. It is contained there, you say?

Q. This shows that as late as that time, so late as August 21st or 22d, you must have been under that impression that that was the manner of the sailing of these ships? A. I presume that is so.

Q. Now, when you say you gave these passengers the information which you did give them, or these people who bought tickets, that was the information you gave them in regard to the vessel, was it not?

A. I did, up until the time I received other information.

Q. When was that?

A. I don't know; I don't remember.

Q. Now, most of these passengers went over to take the "Bristol" before the 24th of August, did they not?

A. Yes, about the 24th.

Q. So that you did not get any information to the contrary between the 22d, and you must have got this letter of August the 24th, when these people went over?

A. I do not recollect the time. I think I received a message, stating that the boat would go to Victoria, but I do not know the date.

Q. Now, let us refresh your recollection. On September 24th, Davidge & Company wrote you about that $35?

A. On September 24th?

Q. Yes. A. That's about a month after?

Q. Yes, I see. That would not throw any light on it. I was thinking it was August 24th. Had you ever seen the steamer "Eugene"? A. Yes.

Q. Had you ever seen her at the time in August when you were selling these tickets? A. I had not.

Q. Did you know anything about her?

A. Only what the McGuires told me.

Q. She was esteemed to be a good river boat?

A. They claimed she was.

Q. That was the purpose of her being taken up to be used on the river? A. Yes, sir.

Q. That is what you told the passengers, was it not?

A. Yes, I understood she was a good staunch boat.

Q. For the river? A. For the river.

Q. And they thought she would be able to make the trip without any trouble whatever; that was the last thing that entered our minds; that there would be any trouble between Victoria and St. Michaels.

Q. Do you know what time the "Bristol" returned to Victoria?

A. I do not remember, but it was after—several days after she was to have sailed. I believe there were several days' delay—four or five days' delay.

Q. I did not mean before her setting out on the trip,

returning to Comox, but when she returned from Alert Bay and gave up the trip. A. No, I did not.

Q. Did you ever see this release, which is said to be signed by Ruff and others? A. No, sir.

Redirect Examination.

Q. (By Mr. HOGAN.) Now, turning to page 223 of your letter copy-book, I will ask you what that is there at the top of the page.

A. That is an order on F. C. Davidge of Victoria, for transportation on the "Bristol." The "Bristol" and "Eugene" to Dawson City—from Victoria to Dawson city.

Q. And this below it on the page there?

A. This is a receipt.

(Proctor for libelant offers the documents referred to in evidence. Objected to by proctor for claimant; first, because they appear to be letterpress copies, and the witness has not shown an excuse for the absence of the original, the original not being accounted for; and second, because they are incompetent, because this is redirect examination, and nothing has been called for in the cross-examination that would warrant this.)

Q. Is this a copy of a letter you mailed?

A. Yes, sir.

Q. This is a copy handed to Davidge & Company?

A. That is a copy of an order that I gave the passengers to hand to Davidge?

Q. Whose signature is that to this lower receipt?

A. W. W. McGuire.

Q. You knew his handwriting? A. Yes, sir.

Q. That is his handwriting, as secretary of the company? A. Yes, sir.

(Proctor for claimant objects to the letters or the writings as before stated, they being only copies, and no ex-

cuse being offered for failure to introduce the originals. We do not base our objection upon the offer of proctor to read the documents into the record. Proctor for libelant reads documents offered.)

"Seattle, Washington, Aug. 21, 1897.

F. C. Davidge & Company, Victoria, B. C.

This will entitle the bearer, Mr. Joseph Jiskra, to transportation, Victoria to Dawson on 'Bristol' and 'Eugene.' We have accepted $200 in cash, balance to be worked out on boats, per agreement with Mr. McGuire.

(Signed) C. W. GOULD, Agent."

"Seattle, Wash., August 21, 1897.

Received of Joseph Jiskra $200, to apply on transportation Seattle to Dawson, Northwest Territory, via steamer 'Eugene.' It is expressly understood and agreed that said Joseph Jiskra shall work on board ships 'Bristol' and 'Eugene' at whatever duties may be assigned to him by officers of said ships during said trip, in payment of balance of $100, due on this ticket. This also includes transportation on 1,000 pounds freight.

(Signed) JOSEPH JISKRA,

(Signed) W. W. McGUIRE,

Secretary Portland and Alaska Transportation Company.

Witnesses:

William H. Giles.

C. W. Gould."

Q. You were present when McGuire signed that, were you? A. I was.

Q. I will ask you what this letter is on page 481 of the letter-book?

A. That is a letter addressed to F. C. Davidge & Company, Victoria, B. C., under date of August 17th, 1897.

(Proctor for libelants offers the letter in evidence. Proctor for claimant objects to the introduction of the testimony for the same reasons offered to the admission of the memorandum and receipt last above read.)

"Seattle Wash., August 17, 1897.

Mr. F. C. Davidge & Company, Victoria, B. C.

Gentlemen: Mr. McGuire, handed me the following memo., 'Write Mr. Davidge at once that Mr. McGuire has closed contract for 1,000 lines of write-ups in "Post-Intelligencer," with the understanding that it be paid by Thursday. Have him instruct you by wire to pay $100.00 for his account as per agreement with McGuire. If not paid by Thursday wire to pay (33 per cent more).' The above itself is explanatory. I presume that it is fully understood between yourself and Mr. McGuire. I am sorry I could not see you before you returned to Victoria, but I received memorandum left with my man. Everything starts off with a vim, and I think we are going to be able to fill out the list without much trouble. They have been having considerable trouble with the passengers of the "Humboldt," and for awhile it looked as though they were going to desert that and make a break for our boat, but at this writing they have patched matters up for the time, and hope to get out of town some time to-morrow. They are short of room for freight, and we may get a pull at them yet. The freight man of which you spoke has not shown up, as yet. I presume that he will be on hand to-morrow. You did not leave any local tickets covering

the passage from here to St. Michaels, and it was absolutely necessary that we have something, so I had some printed. I inclose sample proof of ticket for your information. If this arrangement does not meet with your approval, kindly wire me and send the ticket you desire. You will note that under the arrangement, as outlined in this ticket we furnish passengers with local from here to Victoria, and an order on you for transportation from Victoria to St. Michaels. When they get to Victoria, you people can arrange their passage to connect with the 'Bristol,' and they will not be crying around here over the two transfers. Mr. McGuire wired you to-day with reference to taking some freight for the 'Humboldt' that it could not handle, but received no answer up to this writing. The proposition was that the 'Humboldt' people were to deliver all freight at Victoria, and we take it from there to St. Michael. Mr. McGuire could not see his way clear to talk with them on the proposition of taking freight from here, and has held back a little to see what they had in their hands before we committed ourselves. It looks as though they had bit off more than they could chew, and in case they could not take the freight, the passengers to whom it belonged would desert and come to us. Mr. McGuire thinks it might be well enough to quote a price at which the freight could be delivered at St. Michaels, taken at Victoria, and in case the question comes up again, we will be in position to act intelligently on the matter. Mr. McGuire requests me to mention the matter of the Hustler (should be Hassler), as the matter has to be closed up pretty soon, and may be you had over-

looked it in the shuffle. Will endeavor to keep you fully informed; should anything of unusual importance transpire, will wire you. Have made arrangements with the Puget Sound Bank, as suggested by you while here, and have deposited in the neighborhood of $1,760 to your credit to-day. Very truly yours,

C. W. GOULD."

Q. I believe that is all except your account, is it?

A. Yes, sir.

Q. Now, you say you rendered an account to H. P. McGuire, president of the company, of all moneys that you received from the sale of tickets? A. Yes, sir.

Q. And also an account to Davidge & Company?

A. Yes, sir. They were made in duplicate.

(Testimony of witness closed.)

At this time, further proceedings were adjourned till Friday, November 17th, at 10 A. M.

Mr. J. H. JOHNSON, a witness called in behalf of the libelant, being duly sworn, testified as follows:

Q. (By Mr. HOGAN.) Where do you live?

A. Portland.

Q. What is your business? A. Steamboat business?

Q. What is your business during the month of August last? A. Steamboat business.

Q. What relation did you bear at that time to the firm of F. C. Davidge & Company, of Victoria?

A. I was their representative in Portland; also representative on board the steamship "Bristol."

Q. Are you still their representative?

A. No, sir.

Q. You are acquainted with the steamship "Bristol" and the "Eugene"? A. Yes, sir.

Q. Were you familiar with the business transactions in the month of August last between the Portland and Alaska Trading and Transportation Company and the steamer "Bristol" for the voyage of Alaska?

(Objected to by proctor for claimant as immaterial.)

A. In August, I was on board of the steamship "Bristol."

Q. Was there any contract extant at that time between the Portland company and Davidge & Company in regard to that voyage?

A. Yes, sir. I was absent during the negotiations you know of, that contract; I was in Alaska.

Q. Was that contract in writing? A. Yes, sir.

Q. Have you it with you? A. Yes, sir.

Q. I would like to have you identify the signatures to it. That is the contract you have there, is it?

A. Yes, sir.

Q. By whom is that signed?

A. By F. C. Davidge & Company and the Portland and Alaska Trading and Transportation Company, by H. P. McGuire, president, and the Portland and Alaska Trading and Transportation Company, by E. B. McFarland, vice-president and general manager.

Q. You recognize the signatures to that paper?

A. Yes, all except H. P. McGuire, whose signature I never have seen.

Q. Do you know the signature of McFarland?

A. Yes, sir.

(Proctor for libelant offers in evidence the document produced by the witness, and desires that a copy be submitted in place of the original, so that the original be returned to the witness. Proctor for claimant objects to the admission of the document in so far as it purports in any terms to bind the steamboat "Eugene.")

This article of agreement entered into this 13th day of August, 1897, between F. C. Davidge & Co., of Victoria, B. C., of the one part, and the Portland and Alaska Trading and Transportation Company, a corporation, represented by H. P. McGuire, its president, and E. B. McFarland, its vice-president and general manager, of the second part, witnesseth:

That whereas the said F. C. Davidge & Co. are the charterers and managers of the steamship "Bristol," a registered British ship; and

Whereas, the said Portland and Alaska Trading and Transportation Company, a corporation, are managers and owners of the sternwheel steamer "Eugene," a registered American steamboat, which they desire to sail upon the Pacific Ocean from Comox, B. C., to St. Michaels in Alaska, and desire to make this agreement, whereby the said steamship "Bristol" shall act as a convoy to the said "Eugene" between the said Comox and St. Michaels.

Now, this agreement witnesseth that each party hereby mutually covenant and agree to and with the other of them, its and their executors, administrators, successors; and assigns, by these presents, that is to say:

First.—That the said first party doth agree to carry two hundred (200) persons or passengers for the party of

the second part from Seattle, Washington, to St. Michaels, Alaska, on such steamer or vessel as may be chartered or secured by the party of the first part from Seattle, Wash., to said Comox or other port lying near there, there to be transferred from the said steamer or vessel to the said steamship "Bristol," and to be transferred thence to the said steamship "Bristol" to St. Michaels, Alaska, and to allow one (1) ton free personal baggage to each person, and upon the said trip between Comox and St. Michaels, the said steamship "Bristol" shall act as convoy to the sternwheel steamer "Eugene," the said steamer "Eugene," and anything in the said "Eugene" during the time it is in the convoy of the steamship "Bristol," to be wholly at the owner's risk, and the said convoy to continue for a period of fifteen (15) days from the time stated in this agreement for the departure of the said steamer "Bristol" from the said Comox, B. C., and for each additional sailing day of the said steamship "Bristol" as convoy to the said "Eugene," the said party of the second part is to pay the said party of the first part ($200.00) two hundred dollars per day for such services as convoy.

Second.—The party of the second part doth hereby engage to provide and furnish not less than one hundred and fifty (150), or more than two hundred (200), passengers on board said "Bristol" by twelve (12) o'clock noon of the day herein provided for the sailing of the said steamship "Bristol" as convoy from Comox, and to pay such party of the first part one hundred (100) dollars passenger fare for each person so conveyed from Seattle to St. Michaels, and to pay the said party of the first part

hundred and fifty (150) passengers that the said second party shall fail to furnish, it being understood that the said second party is to pay for one hundred and fifty (150) passengers, whether they furnish them or not, and in addition thereto to pay first parties one hundred ($100) dollars for each passenger in excess of the one hundred and fifty (150) passengers for such transportation as provided in this agreement between Seattle and St. Michaels, and in addition thereto to pay the party of the first part one-half (½) of the cost of the fare of each passenger between Seattle and Comox, such fare to be ascertained and paid prior to the sailing of the steamer or vessel that may be chartered to transport said passengers from Seattle to Comox.

Third.—It is further agreed between the parties hereunto that during the said convoyship that the master and owner of the said steamer "Eugene" shall take directions and instructions from the master of the "Bristol," as to the sailing and handling of the said "Eugene," and that the said "Eugene" is to furnish its own motive power, at its own proper cost and expense during the said voyage.

Fourth.—That the said "Bristol" shall give to the said "Eugene" tow, whenever called upon to do so by the master of the "Eugene," and also in case of stress of weather or other accidents happening to the said "Eugene"; and it is further agreed that in case of the fortunes of weather or any other misfortune of any kind whatsoever happening to the said "Eugene," the said steamship "Bristol," or the said owners of the said "Bristol," or the parties of the first part hereunto, shall not in any manner

whatsoever be bound to make good the said steamer "Eugene" itself or anything in the said "Eugene."

Fifth.—It is further agreed that no loss of sailing days of the said "Bristol" shall be allowed on account of accidents to the said "Eugene" or stress of weather compelling the said "Eugene" to put into port, and that the said "Bristol" shall stand by in case of such stress of weather or accident and be entitled to the reckoning of sailing time and to compensation herein provided, the same as though the said "Eugene" was sailing.

Sixth.—It is further agreed that the sailing time shall commence to be computed from the time provided in this contract for the departure of the said "Bristol" as convoy from Comox and that any delay in starting on said voyage from said Port Comox caused by the failure of the said "Eugene" to be ready to start in conveyship from said Comox upon the day herein provided for the sailing of the said "Bristol" from said Comox shall be reckoned as part of the fifteen (15) sailing days for convoyship without additional charges that are provided in this contract.

Seventh.—It is further agreed that in case the said party of the first part shall have passengers or freight to unload at Dyea, that the said time so occupied in so unloading shall not be considered sailing days of the said steamer "Eugene"; and it is further agreed between the parties hereunto that the said first part shall have the free use of the said steamer "Eugene" and her crew in unloading passengers and freight so shipped by the said first party in the said "Bristol" to St. Michaels, and shall likewise have the free use of the said steamer in unload-

ing the said one hundred and fifty (150) passengers and their baggage provided for in this agreement at the said St. Michaels, without cost or expenses to the said first party for the use of the said steamer.

Eighth.—That the said steamer "Bristol's" sailing date from Comox under this agreement shall be August 25, 1897, and that upon said date the said steamer "Eugene" shall be ready to depart from said Comox, B. C., in convoy of the said "Bristol," and the sailing day of the vessel or steamer to be chartered or provided for the carrying of the said passengers and their baggage between Seattle and Comox shall be hereafter designated, and not earlier than August 23, prior to the time provided herein for the sailing of the said "Bristol" as convoy from Comox.

Ninth.—It is further agreed by and between the parties hereunto that upon the signing and sealing of this instrument said party of the second part shall deposit two thousand ($2,000) dollars in the Bank of British Columbia, in Portland, Oregon to the credit of F. C. Davidge & Co., and shall make a further deposit of fifteen thousand ($15,000) dollars, or shall have paid to the said F. C. Davidge & Co. said fifteen thousand ($15,000) dollars on or before the 23d day of August, 1897, and additional thereto the sum of one hundred ($100) dollars for each passenger over one hundred and fifty (150) passengers up to two hundred (200) as provided in this contract; and it is further agreed that the said two thousand ($2,000) dollars deposited in the bank upon the signing and sealing of this contract shall be forfeited to the said party of the first part, in case the said party of the second part shall fail to pay in the said fifteen thousand ($15,000) dollars to the

said bank or to the said party of the first part, as herein provided; and it is further agreed that the said first party are to receive three hundred ($300) dollars for each and every ticket from Seattle to St. Michaels sold by the said party of the first part up to the amount of fifteen thousand ($15,000) dollars, which sum shall be credited on the said fifteen thousand ($15,-000) dollars to be paid for said one hundred and fifty (150) passengers, and that upon the sale of a sufficient number of tickets at three hundred ($300) dollars each to make fift een thousand ($15,000) dollars, the balance of said one hundred and fifty (150) tickets are to be delivered to the said party of the second part without charge; and it is further agreed in case the said party of the second part shall have so deposited with the bank, or have purchased fifteen thousand ($15,000) dollars worth of tickets on or before August 23, 1897, the two thousand ($2,000) dollars herewith deposited as a forfeit shall be applied in payment of such sums of money as may become due under this agreement for the "Bristol," acting as convoy to the said "Eugene,"the sum to be held by the bank until report shall be received from the master of the "Bristol"; and it is further agreed that the sailing days to be paid for the services of the "Bristol" as convoy in excess of the ten (10) days covered by the two thousand ($2,000), deposit shall be due and payable by the second party to the master of the "Bristol" prior to the casting off of lines at St. Michaels, and the said party of the second part doth hereby agree to indemnify and pay, or cause to be paid, unto the said party of the first part, the said fifteen thou-

sand ($15,000) dollars for the one hundred and fifty (150) passengers' fare to be furnished under this agreement on or before the date of sailing from Seattle; and does further agree to pay unto the said party of the first part two hundred dollars ($200) dollars for each day over fifteen (15) days as provided in this contract for the said "Bristol," acting as convoy for the said "Eugene."

Tenth.—It is further agreed that upon the sale and payment by said party of the second part to the said party of the first part of one hundred and fifty (150) tickets, and the payment of said one-half passenger fare between Seattle and Comox, said party are to have three tickets, free of charge, from Port Comox to St. Michaels, and return to Victoria, B. C.

In witness whereof, the first parties have signed and sealed this instrument, and the second party has caused this instrument to be executed by its president and vice-president and general manager, they being thereunto duly authorized by a resolution of the board of directors of the said second party, to make, execute, and sign and deliver this instrument.

F. C. DAVIDGE & COMPANY,

Per pro. J. H. Greer,

By Telegraphic Authority from F. C. Davidge & Co.

THE PORTLAND AND ALASKA TRADING AND TRANSPORTATION COMPANY.

By H. P. McGUIRE, President.

In presence of D. P. Johnson.

THE PORTLAND AND ALASKA TRADING AND TRANSPORTATION COMPANY.

By E. B. McFARLAND, Vice-President and General Manager.

Q. Do you know whether or not the voyage contemplated in that contract was afterwards undertaken by these vessels?

A. Yes, sir, it was.

Q. Were you in the party that went on that trip?

A. I was on board the "Bristol" as purser of the steamer.

Q. What time did you leave Victoria, if you remember?

A. We left in the morning about seven or eight o'clock, I think. This was the 31st of August, I think. I have got a very poor memory for dates.

Q. There is no controversy about the date; how long did you proceed on your journey?

A. About forty miles outside of Queen Charlotte sound.

Q. Was the "Eugene" in tow during that time?

A. Yes, sir.

Q. Where was she picked up by the "Bristol?"

A. Out between Victoria and Comox. You mean going up?

Q. Yes.

A. Between Victoria and Comox.

Q. Now, Queen Charlotte sound is as far as you went?

A. Outside of Queen Charlotte sound.

Q. What was the reason for turning back?

A. The "Eugene" signaled to stop, and gave instructions to the "Bristol" to be towed back to the nearest port; they signaled "broke down; tow back to nearest port."

Q. The "Eugene" was unable, then, to go further on the voyage?

A. I don't know.

Q. That was the signal?

A. I presume so.

Q. How long did you remain there before starting back?

A. We almost immediately turned back; as soon as we could hail them and get their order, we turned back right off.

Q. Where did you stop, the next port?

A. The next port we stopped at Alert bay.

Q. How far was that from where you turned around?

A. Oh, I suppose that must be a hundred miles, I guess.

Q. Now, at the time the "Eugene" signaled to you that she was broken down, and to turn around, or prior to that time, was there any storm or bad sea?

A. Not what we would call a storm or bad sea.

Q. You may describe what there was of that nature. There is some intimation here in the case that there was a storm. Describe it as near as you can; the character and condition of the weather there at that time.

A. There was very little sea on, but a strong breeze, at times squally, but not what we would call heavy weather.

Q. I believe you have in your possession two photographs taken at the time of the "Eugene," have you?

A. Yes, sir.

Q. I wish you would produce those photographs (wit-

ness does so); were you present when those photographs were taken?

A. I was on board of the ship.

Q. They were taken from aboard the "Bristol"?

A. They were taken from aboard the "Bristol."

Q. I show you this photograph marked by the commissioner "AA" for identification; what boat does that picture represent?

A. That is the steamer "Eugene" shortly after she signaled to stop.

Q. About how long after?

A. Oh, less than 15 minutes.

Q. That was taken from the deck of the "Bristol" or some point on the "Bristol"? A. Yes, sir.

Q. Is she in tow there by the "Bristol" as represented in that picture? A. Yes, sir.

Q. The tow line does not appear?

A. That was a wire cable, and when the "Bristol" stopped that cable disappeared.

Q. When was this other picture taken which has been marked for identification "AB," and what does it represent?

A. About the same time; I cannot say whether immediately before or after this other one.

Q. Is that the "Eugene" in the distance there, in that picture? A. Yes, sir.

Q. Had the storm abated any or had the wind gone down when these were taken? A. No, sir.

Q. Just the same as it was during the blow?

A. Yes, sir.

(Proctor for libelant offers photographs in evidence.)

Q. (By Mr. FLANDER.) Did you see these photographs taken? A. No, sir.

Q. How do you know they represent the "Eugene" at these times?

A. From the position and general conditions that show in the picture.

Q. The "Eugene" was towing behind the "Bristol" for several days, was she not?

A. Several days, yes.

Q. She would be looking about the same on any of these days, would she not? A. No, sir.

Q. What would the difference be?

A. Well, in the first place we had no weather similar to this, in my judgment. You can see she is practically stopped, otherwise the tow-line would be visible, and you could see the break of the water under her bow. The position of the men on the deck of the house I remember distinctly; one is Capt. Lewis, who was making signals; he would break a stick and throw it down on the deck to indicate a break down, being too far away to make us hear.

(Proctor for claimant objects, for the reason the photographs are not sufficiently identified. Papers marked Libelant's Exhibits "AA" and "AB," and returned herewith.)

Q. How long did you stop at Alert Bay after putting in there?

A. I stayed there about two days and a half.

Q. What was done there, what was the purpose of staying there so long, what was under discussion?

A. Waiting there, putting the steamer in condition, or making a decision as to what they would do with her.

Q. That is, the "Eugene"?

A. Yes, the "Eugene."

Q. Whose decision were you awaiting?

A. The representatives of the steamer "Eugjene."

Q. What men?

A. Capt. Lewis and Mr. E. B. McFarland.

Q. Did they finally come to a decision?

A. Yes, sir.

Q What was it?

A. That the "Eugene" could not proceed to St. Michaels.

Q. Did McFarland, as manager of the Portland and Alaska Trading and Transportation Company, sign a paper to the "Bristol" people? A. Yes, sir.

Q. Have you that paper with you?

A. Yes, sir.

Q. I would like you to produce that, Mr. Johnson. (Witness produces paper.) In whose handwriting is this paper?

A. Mr. McFarland's.

Q. Were you present when Mr. McFarland signed that paper? A. Yes, sir.

Q. That was at Alert Bay on the date it bears date?

A. Yes, on board the steamship "Bristol."

(Proctor for libelant offers paper in evidence. Objected to by proctor for claimant in so far as there is any attempt to bind the "Eugene" or her owners by any of the statements made, the same being incompetent for such

purpose. By agreement of proctors, the document was returned to the witness, a copy thereof being made by the commissioner and inserted in the record.)

Libelant's Exhibit "AC."

Alert Bay, Sept. 6th, 1897.

Captain James McIntyre, Commander S. S. "Bristol."

Sir: In view of the unseaworthy condition of steamer "Eugene," rendering her unfit for voyage to St. Michaels, even with repairs which it is possible to make with means available, and furthermore, owing to the urgent request of a large number, if not the entire list, of passengers on board S. S. "Bristol," that said S. S. "Bristol" return to Victoria, B. C., we hereby request and authorize S. S. "Bristol" to return to Victoria, B. C., in consideration of which we hereby release and absolve said S. S. "Bristol" and her charterers from any and all obligation of whatever nature and kind, specified in contract entered into by F. C. Davidge & Co. with the Portland and Alaska Trading and Transportation Co., dated Aug. 13th, 1897, or that may be contingent thereon, and furthermore, guarantee to compensate the charterers of S. S. "Bristol" for time lost in attendance on str. "Eugene" at Alert Bay, and in return to toward Victoria, B. C., provided such service is not called for under contract aforesaid.

Furthermore, we hereby agree to indemnify and protect S. S. "Bristol" and her charterers against any and all claims which the passengers on board said S. S. "Bris-

tol" may make against S. S. "Bristol" or her charterers, by virtue and under tickets which they hold for passage on S. S. "Bristol," and under shipping receipts for transporation of freight.

PORTLAND AND ALASKA TRADING AND TRANSPORTATION COMPANY.

By E. B. McFARLAND,

Vice.-Pres. and General Manager.

Q. I will ask you if you have a letter from Capt. Lewis, who was master of the "Eugene" at that time, Mr. Johnson. A. Yes, sir.

Q. Was that letter written in connection with this release? A. No, sir.

Q. What date was it written on?

A. September 6th, 1897.

Q. That was the date the release bears?

A. Yes, sir.

Q. Who was Capt. Lewis, who signed that letter?

A. Master of the steamer "Eugene."

Q. To whom was that letter delivered?

A. Capt. James McIntyre, master of the steamship "Bristol."

(Proctor for Libelant offers in evidence letters produced by witness.)

The WITNESS.—I object to leaving this letter here.

Q. Explain, Mr. Johnson, why you do not want to part with this letter at this time.

A. It is needed in Victoria in connection with the suit now pending there.

Q. You may read that letter to the commissioner and have him take it down.

A. "Alert Bay, Sept. 6th, '97.

Capt. McIntire:

Dear Sir: Yours received and contents noted. I must say that the steamer "Eugene" is not in a fit condition to proceed with the steamer "Bristol" on her voyage north. We will have to remain here until towed out or convoyed by some steamer.

Yours respectfully,

C. H. LEWIS,

Master of Str. 'Eugene.'

To Capt. Jas. McIntire, Master of S. S. 'Bristol.' "

Q. Who does that letter belong to, Mr. Johnson?

A. F. C. Davidge & Co.

Q. And under their instructions you are not allowed to leave them on file here?

A. Yes, I am not allowed to leave it on file.

Q. What knowledge have you in regard to the delivery of that letter, Mr. Johnson, by Mr. Lewis to Capt. McIntyre?

A. I have none whatever.

Q. How did you get the letter?

A. From Messrs. Davidge & Co.

Q. Did you have it when you returned to Victoria on that trip?

A. No, sir; I presume Capt. McIntyre had it.

Q. Do you know the signature of Capt. Lewis?

A. No, sir.

(Proctor for claimant moves to strike the testimony relating to the letter on the ground that it is not identified, and on the further ground that it cannot bind the "Eugene" or her owners, and the testimony is incompetent.)

Q. Now, I would like to inquire whether Capt. Lewis was present during all the time these negotiations were pending at Alert Bay, that you have testified to that lead up to the signing of this release here by E. B. McFarland, manager.

A. I do not understand that question.

Q. Was Capt. Lewis present during any of that time, and did he take part in any of the negotiations or talk?

A. No, sir, if you refer to that document.

Q. Well, but during any of the previous conversations which lead up to the signing of this release, was Capt. Lewis—did you talk with him or did he talk with or take part in any of the conversations? A. No, sir.

Q. Were there any meetings of passengers and the masters of the boats, or other business during these two days, to discuss the situation there?

A. I presume so; I do not know.

Q. Do you know whether Capt. Lewis attended any of these meetings? A. I do not know.

Q. Mr. McFarland was along the whole of this voyage, as far as you went, was he? A. Yes, sir.

Q. And returned with you to Victoria?

A. Yes, sir.

Q. Now, do you know to whom the money was paid, collected of these passengers for their passage, who was it paid to in the first instance?

A. Paid to F. C. Davidge & Co., as agents for the Portland and Alaska Trading and Transportation Company, through their various subagents.

Q. Davidge & Co., then, were agents for the Portland and Alaska Trading and Transportation Company in the sale of these tickets, were they? A. Yes, sir.

Q. Was any of that money paid to the Portland and Alaska Trading and Transportation Company—if so, what amount?

Q. (By Mr. FLANDERS.) He says he was agent in Portland. I want to know whether he knows, before he answers any of these questions, of his own knowledge.

A. Yes, $9,500.

Q. (By Mr. HOGAN.) Was there a receipt taken for that money? A. Yes, sir.

Q. Who was that money paid to?

A. E. B. McFarland.

Q. Was that proceeds of the passage money?

A. —Vice-president and general manager.

Q. Was that the proceeds of the passage money or part of it? A. Yes, sir.

Q. Was there a receipt taken for that money from McFarland, as manager?

A. Yes, several receipts; the amount was paid in several payments.

Q. Where are they?

A. They are in Victoria.

(Proctor for claimant moves to strike testimony of witness with reference to payments of this money, for the reason that the receipts are the best evidence.)

Q. Do you expect these receipts here?

A. I sent for the receipts and they ought to have arrived.

Q. What time should they be here in the regular course?

A. They ought to arrive here to-day, to-day's mail.

Q. Will you be able to get them if they come in to-day?

A. Yes, sir.

(Proctor for libelant asks permission to recall the witness upon arrival of the receipts.)

Cross-Examination.

Q. (By Mr. FLANDERS.) You say your business is manager or representative of F. C. Davidge & Co. of Portland? A. Now?

Q. At the time to which you testify.

A. That was my position, yes.

Q. Were you a member of the firm at the time?

A. No, sir.

Q. Simply an employee?

A. Yes, sir.

Q. You went along on the "Bristol" as her purser?

A. Yes.

Q. As a representative of Davidge & Co., along with the captain of the "Bristol"?

A. Along with the captain.

Q. Of the "Bristol."

A. I went with him, yes.

Q. You and the captain of the "Bristol" were representatives of Davidge & Co?

A. I don't know what the captain was; I know I was a representative.

Q. Davidge & Co. were charterers of the "Bristol," were they not? A. Yes, sir.

Q. Was the captain there as their employee, or was he an employee of the owners of the "Bristol"?

A. He was employed by the owners of the "Bristol."

Q. How was he at that time?

A. He was then and has been.

Q. Since?

A. Whatever his relations may be now under the terms of the charter-party I could not tell you.

Q. As a matter of fact, Davidge & Co. did not pay the captain? A. No.

Q. You say you left Victoria on the 31st of August?

A. One minute, I will just retract that. Davidge & Co. did pay the captain, I believe.

Q. You say you left Victoria on the 31st of August, 1897? A. Yes, sir.

Q. You picked the "Eugene" up outside of Victoria, between Victoria and Comox? A. Yes.

Q. Do you know the libelant in this case, Charles Ruff? A. No, sir.

Q. Did not know anybody by that name?

A. No, sir.

Q. Do you know Gustave Jacobi? A. No, sir.

Q. You do not know whether or not there were any people of that name or of these names on board the "Bristol"?

A. I think there were; if I had the list here I could tell for sure.

Q. You do not remember these men in particular?

A. No, sir, I do not.

Q. All the passengers were on the "Bristol," were they not? A. All the passengers?

Q. All the passengers,

A. All the passengers that were on the "Bristol" were on the "Bristol."

Q. Were there any passengers on board the "Eugene"?

A. I don't know; there were a number of people there; whether they were passengers on her I don't know.

Q. Do you know whether or not the "Eugene" had any passenger outfits on board?

A. I don't know.

Q. The "Eugene" was towed up by the "Bristol"?

A. Yes, she was towed, yes.

Q. By what kind of a hawser?

A. Wire cable.

Q. How long? A. About nine hundred feet.

Q. Did the "Eugene" have up steam?

A. Yes, sir.

Q. All the time? A. Yes, sir.

Q. And from Comox out she went with her own power for a hundred miles or thereabouts?

A. I don't know the distance.

Q. But for some distance? A. Yes, sir.

Q. And from that time on until she got to Alert Bay she was in your tow—in tow of the "Bristol"?

A. Yes, sir.

Q. Having steam for herself?

A. Yes. It should be understood that she was practically being towed; that is that the hawser was made fast —we made no pretense of towing her, but convoying her.

Q. The hawser was not taut?

A. Oh, yes.

Q. You did not consider yourself her towboat, but simply her convoy, is that it? A. Yes, sir.

Q. Now, you say that this signal was made by the "Eugene" about forty miles from Queen Charlotte sound? A. Yes, sir.

Q. That was on the open sea, was it not?

A. Yes, sir.

Q. How long had you been on the open sea—from the time you left Queen Charlotte sound? A. Yes, sir.

Q. You say the weather at that time was not what you would call stormy or bad weather, the sea was not what you would call stormy or bad? A Yes.

Q. You mean that a vessel like the "Bristol" which was built for a sea voyage and was an ocean going vessel, was not much of a sea for her?

A. No, sir; it was the open sea.

Q. Was there or was there not a wind?

A. There was a wind.

Q. Do you remember the direction of the wind?

A. Southeast.

Q. Southeast wind; that is the wind that denotes stormy weather, does it not?

A. I do not know.

Q. What experience have you had with the sea in the vicinity of Victoria—had any experience on the coast?

A. Oh, yes, I have gone to sea a good deal.

Q. On the Pacific coast? A. Yes, sir.

Q. Don't you know as a matter of fact that a south or southwest wind is the wind that ordinarily causes the rough weather?

A. Yes, when they blow hard enough.

Q. Well, how was the wind this time, did it blow hard or not?

A. Not so very hard; quite a stiff breeze.

Q. Now, how is the sea, or how was the sea acting on the "Bristol" herself?

A. Did not have any effect on her.

Q. Of course it did not render her unseaworthy, but was the sea on her deck at all? A. No.

Q. Not at all? A. No.

Q. While the "Bristol" was convoying the "Eugene" there never was any time in which the sea was washing her decks or striking her decks, was there?

A. No.

Q. None of the passengers on the "Bristol" were sick, were they? A. A few, a very few.

Q. How long had the wind been from the south?

A. About—I don't know.

Q. What time of day was it that the "Bristol"—the "Eugene" made the signal to the "Bristol"?

A. About seven minutes past two.

Q. In the afternoon, of course.

A. Yes, sir.

Q. Had it been blowing from the south all that day?

A. Yes, sir.

Q. How fast were you going an hour?

A. About seven knots.

Q. You do not know how long before that day the wind had been blowing from the south?

A. No, sir; I was not there.

Q. You were steaming out in the open sea, took the outside passage? A. Yes, sir.

Q. Anything said to you by Mr. McFarland or by Capt. Lewis—you say Capt. Lewis was in charge of the "Eugene"? A. Yes, sir.

Q. With reference to the outside passage?

A. Yes, sir.

Q. They wanted you to go on the inside, did they not?

A. Yes, sir.

Q. And you refused to do it? A. Yes, sir.

Q. They claimed that your contract made you take the inside and you claimed that you did not, is that correct? A. No, sir.

Q. Now, just what was said between you at that time.

A. They claimed that they had an understanding with somebody to go inside.

Q. You would not go inside? A. No, sir.

Q. Why not?

A. It was better for us to take the outside passage.

Q. Why better?

A. Shorter distance; impossible for us to take the inside passage, as we did not have a pilot.

Q. The "Bristol" did not have a pilot?

A. For the inside passage to the extent that they wished to go.

Q. How far could they have gone up the inside passage?

A. They could have gone to Dixon's entrance.

Q. That is not far from the Aleutian Islands, is it?

A. Yes, quite a distance.

Q. How much open sea would have been saved by going up that distance? A. None.

Q. No open sea would have been saved?

A. No.

Q. Why did they want to go the inside passage then?

A. I do not know.

Q. Would it not have been smoother inside than where it was outside where you were going that day?

A. As long as we kept inside, yes.

Q. You say you could have kept inside up to Dixon's entrance? A. Yes, sir.

Q. How far up the coast would that have been from where you were at the time?

A. I could not tell without a chart.

Q. Would it be five hundred miles? A. No.

Q. It would not have been that far? A. No.

Q. The chart would show? A. Yes, sir.

Q. Now, what signal was made by the "Eugene"?

A. When?

Q. For you not to go ahead any more, what kind of a signal was made?

A. A blast of the whistle to stop.

Q. How far astern of you was she then?

A. The length of the tow-line.

Q. That was about 900 feet.

A. About 900 feet.

Q. What did you do then? A. The "Bristol"?

Q. Yes. A. Stopped

Q. What then?

A. Hailed them for more definite information.

Q. Keep right on and see what was done.

A. The captain of the "Eugene" had a stick which he would break, which he would hold over his head and break and throw down on the deck, which we interpreted to mean "Broke down." The captain of the "Bristol" took a blackboard and wrote "come up," and exposed it; they with their glasses read it and the "Eugene" then worked up closer to our steamer and exhibited on a blackboard "Tow back to nearest port; broke down." Then the "Bristol" swung around and towed her.

Q. To Alert Bay? A. To Alert Bay, yes, sir.

Q. When did you get to Alert Bay?

A. We came there the next forenoon.

Q. Day and night. A. Yes.

Q. How was the wind?

A. The wind moderated, and then again we had some squalls during the night.

Q. Wind from the same direction? A. Yes, sir.

Q. Alert Bay was the nearest harbor to put into, was it? A. I judge so, yes, sir.

Q. Who ordered her to Alert Bay?

A. I don't know.

Q. Did any men from the "Eugene" board the "Bristol" at that time? A. Which time?

Q. At the time she started to turn back.

A. No, sir.

Q. None of your men boarded the "Eugene"?

A. No, sir.

Q. You say that there were objections made to the "Bristol" taking, or towing the "Eugene" on the outside, passage—you said that, did you not?

A. Yes, sir.

Q. Who made these objections?

A. Mr. McFarland.

Q. Did Captain Lewis say anything?

A. I don't know.

Q. Who did McFarland make the objections to?

A. To both Captain McIntyre and myself.

Q. What reason did he give for wanting to take the inside passage?

A. He stated that he had represented to the "Eugene" crew that the steamer would go by the island passage.

Q. Did he say it was safer or not?

A. I do not remember whether he spoke of the safety or not.

Q. He stated that it was the understanding between him and the "Eugene" crew?

A. Yes, I questioned him as to what he had to show for the understanding; there was nothing but the contract to guide me.

Q. Now, you say you stayed in Alert Bay for two days or two days and a half.

A. Yes, sir.

Q. What were you doing there? A. At anchor.

Q. What were you doing yourself, why did you stay there that long?

A. I was aboard the ship.

Q. Why did the ship stay there that long?

A. Waiting for the "Eugene."

Q. What was she doing, what was the ship "Bristol" waiting for—who was representing the "Bristol"?

A. In what capacity? The captain represented the ship as master and I was the representative of Davidge & Co.

Q. Now, why was the ship and why were you staying there that length of time, what was the cause of this delay?

A. Under our contract we were compelled to return to a port of safety, in order that the steamer might be repaired in case of accident. The contract specially provides as to why we should stand by.

Q. What was the captain of the "Eugene" trying to do there? A. I don't know.

Q. Did you have any talks with him yourself?

A. Yes, sir.

Q. What about? A. Things in general.

Q. Well, about what in particular?

A. Sometimes we talked about the weather.

Q. How was the weather?

A. Very nice while we were in Alert Bay.

Q. What were the passengers of the "Bristol" doing all this time? A. Nothing in particular.

Q. You say that McFarland signed that contract that you have introduced, or rather that letter to you, authorizing you to return? A. Yes, sir.

Q. How long before you actually returned, started back?

A. That was signed in the afternoon and we started back the next morning.

Q. Was not that one of the reasons why you were staying there that long, to get this contract or to get this letter of McFarland? Had not you and he been having more or less words with reference to what was to be done?

A. More or less words—what do you mean by that?

Q. Well, was there not some difference of opinion between you and McFarland and the captain of the steamer about what was to be done?

A. The captain of what steamer?

Q. Of the "Bristol."

A. Oh, yes, there was some difference of opinion, naturally.

Q. What was McFarland wanting to do?

A. In what respect?

Q. You say there was a difference of opinion; I want to know what his opinion was and what your opinion was.

A. On what subject?

Q. On what was to be done?

A. I had no opinion except to carry out the contract.

Q. What did McFarland want to do?

A. I don't know.

Q. He did not say?

A. If your question is more specific I can probably answer better.

Q. Well, I am asking you.

A. I do not know what McFarland wanted to do.

Q. You say you talked with McFarland?

A. Yes, sir.

Q. What was the feeling among the passengers, what did they want to do?

A. They wanted to go back to Victoria when the "Eugene" broke down and could not proceed.

Q. Did the pasengers consent to release the "Bristol"?

A. Yes, sir.

Q. Was that release signed before or after this letter of McFarland to you.

A. Well, the release was signed by so many passengers; I don't know anything about the time of signing, with the exception that it was on that day, the same day that I got a letter from McFarland; I had nothing to do with standing over the passengers and them signing the letter; they presented it as a whole.

Q. To whom?

A. To the captain of the "Bristol."

Q. To the captain of the "Bristol"?

A. Yes, sir.

Q. And that was received by the captain of the "Bristol" the same day in which you received this letter from McFarland to which you testify? A. Yes, sir.

Q. Did all the passengers of the "Bristol" sign it?

A. All but one.

Q. Do you know who this one was? A. Yes.

Q. What was his name? A. Wirt.

Q. He did not sign it? A. No, sir.

Q. Have you that release with you? A. No, sir.

Q. The passengers, as I understand, wanted to return to Victoria? A. Yes, sir.

Q. And in conformity with their desires you did return to Victoria, they releasing you from the obligations of the "Bristol" to carry them to St. Michaels, is that correct? A. That is partly correct.

Q. In what is it incorrect?

A. In that it was not the sole reason for returning; we had a release also from the transportation company; these two in conjunction were sufficient to warrant us in returning to Victoria.

Q. You returned because these things were done, is that it? A. Yes, sir.

Q. How much freight did the "Bristol" have on board at the time she left—was she down to her lines?

A. No, sir.

Q. How much above her lines was she?

A. I do not know; considerably though.

Q. Where did you join the "Bristol"?

A. At Victoria.

Q. Before the "Eugene" came?

A. Yes, sir.

Q. Was there any freight transferred from the "Bristol" to the "Eugene" at Victoria? A. No, sir.

Q. None; there was some freight transferred from the "Eugene" to the "Bristol" at Victoria?

A. No, sir.

Q. Nothing of the sort? A. . No, sir.

Q. None of the outfits loaded on the "Bristol" were taken over on the "Eugene" at Victoria?

A. Not at Victoria.

Q. At any point? A. At Comox.

Q. . Why?

A. Before proceeding from Comox the officers of the "Eugene" requested that all of the ship's stores and a number of outfits then on board the "Eugene" be put on board the "Bristol" to lighten the "Eugene."

Q. That was done? A. Yes, sir.

Q. That was done at Comox? A. Yes, sir.

Q. Now, where did the "Eugene" have these outfits on board—did she have these on board when she came, when you first saw her at Victoria? A. Yes, sir.

Q. She brought them with her? A. Yes, sir.

Q. She brought them to Comox? A. Yes, sir.

Q. She had come across from Port Townsend—had she not steamed across herself?

A. I think from Port Townsend, yes.

Q. And had these outfits aboard? A. Yes, sir.

Q. They had not been put from the "Bristol" on to the "Eugene" and then put back on the "Bristol" from her?

A. No, sir.

Q. And these stores were the stores of the "Eugene" herself?

A. Yes, and outfits of those on board.

Q. Those on board the "Eugene?" A. Yes.

Q. The crew of the "Eugene"?

A. Yes, I presume the crew.

Q. Did you go on board the "Eugene" after putting into Alert Bay? A. Yes, sir.

Q. Did you look at her? A. Yes, sir.

Q. In what had she broken down?

A. Well, the trusses which had been put in to strengthen her and give her backbone were working loose.

Q. By the force of the waves and sea to which she had been subjected? A. Yes, sir.

Q. Well, the machinery had not broken down, had it?

A. Not to my knowledge.

Q. The "Eugene" was a river steamer?

A. Yes, sir.

Q. Was not an ocean going vessel?

A. No, sir.

Q. And you were towing up to St. Michaels, where she was to run on the Yukon river.

A. We were convoying her to St. Michaels, and from there she was to go, I believe, on the Yukon.

Q. You say the trusses had worked loose—anything else? Had her timbers or her deck or her seams opened?

A. I don't know.

Q. You saw the trusses loose, did you?

A. Yes, sir.

Q. The weather was sufficiently rough to work them loose, was it not? A. Yes, sir.

Redirect Examination.

Q. (By Mr. HOGAN.) Then, Mr. Johnson, there were miners and persons going to Alaska on board the "Eugene," or persons having outfits on board her?

A. Yes.

Q. From the Alaska mining business. About how many?

A. About 10 or 11, I believe.

Q. With outfits ? A. Yes, sir.

Q. Do you know whether any passage money was collected from them or not?

(Objected to by proctor for claimant as incompetent, irrelevant, and immaterial.)

A. I do not know of my own personal knowledge; I was informed that they were.

(Proctor for claimant moves to strike the answer of the witness as hearsay.)

Witness excused from the stand.

JOEL P. GEER, recalled on behalf of libelants.

Q. (By Mr. HOGAN.) How long have you known Capt. Lewis?

A I never knew him until shortly before he went on the "Eugene." I have met him around town once in a while, but never was acquainted with him.

Q. Were you along on that voyage?

A. Yes, sir.

Q. Do you know whose writing this is?

A. I think that was the mate's handwriting, the mate of the "Eugene."

Q. What was his name? ......

A. I canot recollect it now.

Q. Did you know the mate at that time?

A. Never knew him until he came aboard the boat.

Q. Were you present when that letter was written?

A. No, sir.

Q. Cannot you think of the mate's name?

A. I cannot now.

Q. Was not it Jack Kegan?

A. Kegan, I believe, was his name. I think that is his writing.

Q. Other than the signature of Capt. Lewis?

A. Yes, sir.

Q. You did not see the signature of Capt. Lewis?

A No, sir, I do not remember seeing it at all.

Captain F. B. JONES recalled on behalf of libelant.

Q. (By Mr. HOGAN.) Captain, could you identify that signature to that letter as the signature of Capt. Lewis?

A. I don't know that I ever see his handwriting; I don't know that I ever did. I never got any letters from him or anything; I believe I saw his name written once, but I am not sure.

J. H. JOHNSON recalled on behalf of libelant.

Q. (By Mr. HOGAN.) Have you those receipts now, Mr. Johnson? A. Yes, sir.

Q. Do you know the signatures to those receipts?

A Yes, sir.

Q These are the receipts mentioned by you while on the stand before? A. Yes, sir.

(Proctor for libelant offers receipts in evidence. Proctor for claimant objects to their admission as immaterial. No objection made, on the ground that copies are substituted for the original.)

Libelant's Exhibit.

$4,000.00 Victoria, B. C., 25th August, 1897.

Received from Messrs. F. C. Davidge & Co., Four thousand dollars on account of S. S. "Eugene."
For the Portland and Alaska Trading and Transportation Co.

E. B. McFARLAND,

No. Treas. and Gen. Manager.

$2,000. Victoria, B. C., 26th August, 1897.

Received from Messrs. F. C. Davidge & Co., two thou and dollars, on account S. S. "Eugene."
For the Portland and Alaska Trading and Transportation Co.

E. B. McFARLAND,

No. Treas. and Gen. Manager.

$3,500.00 Victoria, B. C., 30th Aug., 1897.

Received from Messrs. F. C. Davidge & Co., three thousand five hundred dollars, on account S. S. 'Eugene."
For the Portland and Alaska Trading and Transportation Co.

E. B. McFARLAND,

No. Treas. and Gen. Manager.

Libelants rest.

At this time further proceedings adjourned unto November 20, 1897, at 2 P. M.

Seattle, November 19th, 1897, 10 o'clock A. M.
Continuation of proceedings pursuant to adjournment.

CLAIMANT'S TESTIMONY.

JOEL P. GEER, the claimant, being duly sworn, testified as follows:

Q. (By Mr. FLANDERS.) Captain Geer, you are the claimant of the steamer "Eugene," are you not?

A. Yes, sir.

Q. On the 31st day of July, 1897, state, if you know, who were her owners.

A. Captain Jones and myself. I think that was the date before we turned it over to the other people.

Q. On the 31st day of July, 1897, did you and Captain Jones enter into a written agreement with the Portland and Alaska Trading and Transportation Company in reference to the "Eugene"?

A. Yes, sir.

Q. I hand you a paper marked "Contract," F. B. Jones and Joel P. Geer and Portland and Alaska Trading and Transportation Company, dated July 31, 1897; state if that is the contract. A. Yes, sir.

Q. There are interlineations, Captain, on the first page. Were they made or not at the time it was signed?

A. They were made before we signed it.

(Paper offered in evidence, received without objection marked Claimant's Exhibit No. 2, and returned herewith.)

Q. I will ask you Captain, whether or not on the 7th day of August, 1897, yourself, together with the Willamette and Columbia River Towing Company, a corporation, entered into a contract with the Portland and Alaska Trading and Transportation Company in reference to the steamer "Eugene."

A. Yes, I think that was the date. Either that or shortly afterwards.

Q. Who were the owners of the "Eugene" at that time, on the 7th of August?

A. Captain Jones and myself, I think.

Q. Was Captain Jones interested in the Willamette and Columbia River Towing Company?

A. Yes, sir, he was president of the company.

Q. I hand you a paper marked "Contract Willamette and Columbia River Towing Company and Joel P. Geer, and Portland and Alaska Trading and Transportation Company, dated August 7th, 1897," and ask you whether or not that is the contract to which you refer.

A. Yes, sir that is the contract.

(Paper offered in evidence, received without objection, and marked Claimant's Exhibit No. 3, and returned herewith.)

Q. Now, Captain, please state, after these contracts were entered into, whether or not there was any change in the ownership of the "Eugene."

(Objected to by proctor for libelant as not the best evidence. Proctor for claimant proposes to submit a copy of the bill of sale later, and does not offer this as proof of the fact itself.)

A. Yes, sir, there was a change in ownership.

Q. Who is the owner of the boat now?

A. The Yukon Transportation Company.

Q. Captain, what interest, if any, in the "Eugene" did the Portland and Alaska Trading and Transportation Company have on the 11th day of August, 1897, or at any time thereafter?

(Objected to by proctor for libelant as not the best evidence.)

A. Never had any interest that I know of, so far as ownership was concerned.

Q. Did they or did they not have any interest in her or connection with her other than what they might have under these contracts introduced in evidence?

A. They never did.

Q. Now, you say when these contracts were signed, you were part owner of the "Eugene"?

A. Yes, sir.

Q. When did you part with your ownership, as an individual in the "Eugene"?

A. At the time the Yukon Transportation Company was formed.

Q. Then, as I understand, she was sold to a corporation? A. Yes, sir.

Q. Now, Captain, what was done with the "Eugene" after the first contract was signed—before you answer that question, you may state what kind of a boat the Eugene is, what she had been doing at the time of that contract?

A. She was a light draught Willamette river steam-

boat, and had been running on the upper Willamette river.

Q. What was her draught loaded.

A. I don't know exactly, but it was in the neighborhood of three and a half to four feet.

Q. And her draught light?

A. The draught light was sixteen inches.

Q. She is a sternwheel boat?

A. Yes, sir, she is a sternwheel boat.

Q. How long has she been running on the Willamette river? A. Three years.

Q. What was her age? A. Three years.

Q. What was her condition at that time as to seaworthiness, as a steamboat?

A. She was in as good condition as a light draught boat can be.

Q. Captain, you may state what was done with the "Eugene" after this contract of July 31.

A. She was pulled out on the ways, given a thorough overhauling, preparatory to going to sea.

Q. Did you oversee the overhauling or not?

A. Well, not personally, there was a carpenter or shipbuilder to oversee her.

Q. The shipbuilder was there to oversee her?

A. Yes, sir.

Q. Did you see it while it was going on?

A. Yes, sir.

Q. Now, you may state just what was done, in the way of overhauling the boat.

A. Well, in the first place, there were two keels put underneath, put inside on the floor timbers, and a Howe

truss built on top of that and timbers built on top. The guards were taken off and timber six by twelve boarded around the outside, so as to strengthen her, and keep the ways from catching under her guard. There was cross bulkheads put in and four-inch keelsons to protect the back of the deck throughout. Her house was fastened onto the deck, and the cabin was fastened onto the freighthouse, and she was boarded up on the outside complete from the guards to the deck under the wheel, and other minor things done. New boilers were put in since she was on the river, two new boilers were put in and the engines overhauled.

Q. What was this all done for?

A. This was done to make it safe for going to sea, except putting the boilers, and that was for making steam.

Q. Putting her safe for going to sea for what purpose?

A. For taking her up to the Yukon river.

A. Under the contract, yes.

Q. Was she fitted up at that time for the purpose of carrying any passengers or freight on the open sea itself? A. No, sir.

Q. You are one of the parties to this contract?

A. Yes, sir.

Q. Was the contract talked over between you and the Portland and Alaska Trading and Transportation Company before it was entered into? A. Yes, sir.

Q. What use of the boat by the Portland and Alaska Trading and Transportation Company was contemplated by this contract as far as you were concerned, when you entered into it?

(Objected to by proctor for libelant as not the best evidence, the negotiations having been reduced to writing afterward, and that writing being introduced in evidence here.)

A. It was contemplated they should continue the use of the boat after they got to the Yukon river and to go up to Dawson City last fall.

Q. What were they to have the use of the boat for?

A. For fitting her up and towing her up to the Yukon river, or having her convoyed up there.

Q. Was she or was she not to be used for the transportation of passengers or freight on the ocean?

A. She was not.

Q. And now, Captain, after the "Eugene" was fitted up in the manner in which you have testified, state what was done with her.

A. She was taken down into the river, and from there she was taken in tow and towed part of the time, and part of the time under her own steam, until we got into the Straits of Fuca; from there she was run up to Port Angeles, where we stopped and waited to put more repairs on her, and went from there to Port Townsend, and from Port Townsend we went to Port Gamble for timber, and back to Port Townsend, where we laid two days and spent something like $300 in addition for work, and from there to Port Angeles, and laid there at that time something like a week, waiting for the "Bristol" to come back from Skaguay or Dyea, when we wanted to go in company with her to the Yukon river.

Q. You met the "Bristol" at Victoria?

A. From Port Angeles we went over to Victoria, and run to the outside harbor, hailing distance of the "Bristol"; we were about 200 feet, and I didn't know the boat at the time, and from there we steamed up the straits towards Comox, and on the way the "Bristol" picked us up and gave us a tow-line and helped us over to Comox.

Q. Now, Captain, when you first went over and met the "Bristol" did or did not the "Eugene" have any passengers on board? A. She did not.

Q. Who were on board the "Eugene"?

A. Her crew.

Q. Of how many did her crew consist?

A. I think there was fourteen. I could count them all.

Q. Fourteen.

A Around there, yes.

Q. Were you on board yourself? A. Yes, sir.

Q. In what capacity? A. Second mate.

Q. As I understand, you were a representative of the owner—of the company?

A. Yes, sir. General manager for the Yukon Transportation Company.

Q. Who was captain of the 'Eugene"?

A. Captain Lewis.

Q. Did the "Eugene" have any passengers on board?

A. No, sir.

Q. No freight on board belonging to any of the passengers? A. No, sir.

Q. Or belonging to the libelants in this case?

A. No, sir.

Q. Or any other passengers? A. No, sir.

Q. What did she have on board?

A. She had on her stores and a few outfits for some of the crew that expected to stay up there.

Q. Were some of the crew expecting to stay up there when they arrived on the Yukon? A. Yes, sir.

Q. Do you know the libelant, Charles Ruff?

A. No, sir, I am not acquainted with him; I have seen him.

Q. When did you first see him?

A. Oh, I never saw him to know who he was, except when he was giving his testimony in this suit in Seattle.

Q. Were you on the "Eugene" during all the time she was making this trip? A. Yes, sir.

Q. Was he ever on the "Eugene" as a passenger?

A. No, sir.

Q. Was any of his outfit or freight on the "Eugene"?

A. No, sir.

Q. Do you know the libelant, Jacobi?

A. I know him by sight, by seeing him here in Seattle; possibly seen him before, but not to remember him.

Q. Was he ever on the "Eugene" as a passenger?

A. No, sir.

Q. Was any of his outfit ever on the "Eugene"?

A. No, sir.

Q. Was any of the outfit of any of the people who took passage on the "Bristol" on the "Eugene"?

A. No, sir.

Q. Were any of the passengers on the "Bristol," ever on the "Eugene" as passengers? A. No, sir.

Q. Now, captain, after you left Victoria, or after you left Comox, you may describe the voyage of the 'Eugene."

A. From the time we left Comox, we left along without the "Bristol"; we were out about 40 miles when the "Bristol" came along and gave us a tow-line; from there we ran up through Charlotte sound outside of Charlotte sound, in fact, as I could not tell Charlotte sound from the ocean except by seeing an island in the distance. We got out in the ocean and a storm came up a blow, it was a storm—it might not have been for a ocean vessel—and about noon Captain Lewis went below and began to examine the boat while I went to dinner.

Q. To examine the "Eugene"?

A. It was then my watch in; I had been steering and I wnt to bed; they woke me up and told me that Capt. Lewis wanted to see me; they did not believe that the boat could stand through the storm and would do well to get back to port.

Q. Now, you may describe how the boat was going then, and what was the condition of the wind and the weather.

A. The weather had progressed on—the wind was squally and it would make the boat pitch a good deal, the "Bristol" as well as the "Eugene," and the waves at times would come up, and the wind would blow the spray up into where we were steering, and she was working down below, the trusses were working, and one of the chiefest dangers in my opinion was the fact that the bow would rise on the waves and come down flat, like a board flat on a barn floor, and we were afraid she would mash the bow in; as a matter of fact it did break some of the timbers in the bow.

Q. What was done—what direction was the sea coming from?

A. Well, we were going into the waves; I do not know particularly what direction the sea was coming from, the wind was—

Q. Was it a head sea or not?

A. No, sir, it was not a head sea at that time; it was coming from the quarter.

Q. Now go ahead; you say you went to your dinner about noon?

A. Well, they woke me up; Captain Lewis wanted me to go down and examine her; I went down with one of the deckhands and made an examination of the boat, and came back and told him that I would rather concurred in his opinion, but I did not like to say anything, as he was captain of the boat, and he had consulted with all the rest of them, and all the rest concurred in his opinion that they would go back, and while I thought that way myself, I did not want to go to any decision on my own part—the decision should be left with the Captain, as he was a seafaring man, so they thought that they had better turn around and go back; he blew the signal and afterwards he went up and wrote on a board, "Take us into the nearest port in tow." In the meanwhile I had taken the wheel, and we had got along rather more alongside of the other boat, and he signaled to take us to the nearest port. There was nothing on board there was brokn d wn. We then turned around and went back to port, and it was pretty dangerous, and a good many of them were scared and wanted to be put off on the "Bristol."

The boat was working, the trusses were working, but in my opinion the chiefest danger was her pounding her bow on the waves.

Q. Was she making any water?

A. Yes, a good deal of water.

Q. How much?

A. I do not know exactly, because we could keep it down with our siphon; we kept steam up all the time, and we kept it down with a siphon, but it made pretty fast.

Q. How was the sea?

A. The waves broke over the bow part of the time and part of the time not.

Q. How were they around her wheel?

A. Around her wheel I don't know; I was not back aft at all. When we got into Alert Bay we got there in the afternoon; I know the time because we came alongside the "Bristol" at one time, and I got on there to see a party, and they went in, and I was on there until after dinner, and I was there until about two o'clock, I think, before we came to anchor.

Q. How had the weather been, the sea and the weather been prior to the day on which this had happned?

A. Fair.

Q. How had the "Eugene" behaved in that weather?

A. Good.

Q. Had anything broken or not?

A. Coming over the Columbia river bar, outside there they broke a hog chain in which there was a flaw, which could not be seen—it was next the timber—but that was

fixed and there was nothing broken until we struck that storm.

Q. Where was that fixed?

A. That was fixed at Port Townsend.

Q. That was one of the repairs to which you have referred in your testimony?

A. Yes, sir.

Q. You say the weather was fair from the time you left Comox until you got into the open sea?

A. Yes, sir.

Q. Had the "Eugene" been making any water then?

A. No, sir, not to speak of.

Q. Do boats make, as a general rule, any water or not?

A. I never knew one but what made some.

Q. You had a siphon on, as I understand?

A. Yes, six of them, I think.

Q. What was the condition of the "Eugene" as to her seaworthiness as a steamboat when she left Victoria?

A. No pains or expense was spared to put her in as good condition as we could, what we considered as good a condition as she could be put in.

Q. Was or was not the trip of the "Eugene" to St. Michaels an experiment?

A. It certainly was.

Q. Did you as an owner of the "Eugene" consider it as such?

A. It was considered running a risk of losing the boat, certainly.

Q. After the "Eugene" came into Alert Bay in what condition did you find her?

A. We found her pretty badly strained; there was a report made with some of the passengers and officers of the "Bristol," and captain of the "Eugene" made an examination.

Q. You were down with them?

A. I was not with them but they made a report.

Q. Did you make an examination?

A. I made an examination afterwards of the forward part of the boat; I did not go aft because the Captain made an examination there and this committee, and had made their report.

Q. What did you find forward?

A. I found that some of the timbers had been broken forward by the force of the waves; this committee never found that from the fact there was wood stowed in the hold and they could not get at it; I went in there and moved that wood and came in forward so as I could make a further examination.

Q. You found it had been stove in by the waves?

A. Yes, sir.

Q. What was the condition of the "Eugene" as to her ability to further proceed?

A. Well, I do not think that she was in a position to proceed on that voyage to St. Michaels at that time —certainly was not.

Q. Why was not she?

A. On account of the force of the waves on her.

Q. How were her seams?

A. Her seams were leaking pretty badly.

Q. They were leaking badly? A. Yes, sir.

Q. Now, what was done with the "Eugene"?

A. She was brought to Seattle and put on the ways and overhauled.

Q. Over here at Ballard. A. Yes, sir.

Q. Do you know what was done on her?

A. There was some timbers put in, timbers were spliced and calked throughout.

Q. Why was that done?

A. Well, because the opening of some of the planking made necessary; some of the planking was strained.

Q. Do you know who ordered that done?

A. Well we had her put on the ways, had it done. Capt. Jones and myself.

Q. Were these repairs rendered necessary to her by reason of the weather to which she had been subjected?

A. Yes, sir.

Q. I understood you to say, Captain, that that day in which Captain Lewis decided that she would have to put back, the waves at times were breaking upon the bow of the boat?

A. Breaking over the bulwarks on the bow.

Q. How high was that above the water?

A. I think about eight or nine feet.

Q. How was the sea itself?

A. The sea was choppy.

Q. The sea was breaking? A. Yes, sir.

Q. How was the sea on the "Bristol," did you notice?

A. The "Bristol" was pitching a great deal, I think,

for an ocean vessel, pitching badly; she was going up and down and rolling a great deal.

Q. Was she or was she not high above the water?

A. Yes, she was pretty high above the water.

Q. How was the "Eugene" behaving?

A. Well, she was behaving as well as could be expected for a river boat in a storm.

Q. You considered it stormy, did you not?

A. It was not a winter storm; she could not have lived through a winter storm half an hour; it was a storm for a river boat; it was not a storm for an ocean going vessel.

Q. Was it rougher weather than you had been having? A. Yes, sir.

Q. How was the weather there compared with the weather that you had from the Columbia river and the straits?

A. It was entirely different, for the worse.

Q. Entirely for the worse?

A. Yes, sir.

Q. How had the "Eugene" behaved on the trip from Columbia river to the straits?

A. No trouble at all, except the breaking of that hog chain where that flaw was.

Q. How did her truss behave?

A. Her trusses had given way and we put in a new piece on top; the trusses were made in splices, and we put a piece the full length at Port Townsend.

Q. What kind of weather did you have from the Columbia river to the straits?

A. We had very good weather, and we had a little blow one evening; one evening we lay up under the lee of Destruction island until morning.

Q. A blow one evening? A. Yes, sir.

Q. From what direction?

A. It was from off shore, I think.

Q. Was it accompanied with rain or not?

A. No, sir, it was not rain, it was fog.

Q. You say you were general manager of the Yukon Transportation Company, of Portland, Oregon?

A. Yes, sir.

Q. The owner of the "Eugene."

A. Yes, sir.

Q. Did you receive any of the passage money of these libelants? A. No, sir.

Q. Did you have any dealings with these libelants?

A. No, sir.

Q. I understand you never saw them to know them until they got into Alert Bay?

A. I never saw them to know who they were until they got here in Seattle after they returned with the boat.

Cross-Examination

Q. (By Mr. HOGAN.) Are you a member of the Yukon Transportation Company? A. Yes, sir.

Q. Are you an officer of that company?

A. General manager.

Q. Are you an officer besides?

A. Master of the steamer.

Q. Have you the articles of incorporation of that company here? A. No, sir.

Q. Are they here? A. No, sir.

Q. Who are the other members or incorporators of that company?

A. Capt. Jones—I am not certain who the other incorporators are.

Q. How many are in it?

A. That I do not know; stock has been issued at a dollar a share.

Q. But the original incorporators who filed the articles, who are they?

A. I am not certain who; I think Mr. Searns was one.

Q. Are the McGuires interested in that corporation?

A. No, sir.

Q. They hold any stock in it? A. No, sir.

Q. Now, prior to the making of these contracts that have been introduced in evidence here in August, what interest did you have in that boat?

A. I had purchased all of Capt. Jones' interest; I had her partly paid for.

Q. You had a contract for the sale of the boat from Capt. Jones? A. Yes, sir.

Q. What interest did you have in it, what did it represent?

A. That represented the whole of it when it was paid for.

Q. But there was a payment back on it?

A. Yes, sir.

Q. The legal title, then was in Jones?

A. The Columbia River Towing Company.

Q. Of which Jones was president? A. Yes, sir

Q. Then both of you and Jones claimed to be owners of this boat, made these contracts with the Portland Company—with the McGuires? A. Yes.

Q. Was Jones interested in the Portland and Alaska Trading and Transportation Company?

A. Not that I am aware of.

Q. I will ask you if he was not one of the incorporators of that company?

A. Not that I am aware of.

Q. You do not know about that?

A. I do not know about that.

Q. At that time he held the legal title to this boat?

A. Yes, sir.

Q. Now, was possession of this boat delivered to the Portland and Alaska Trading and Transportation Company at the time of the making of these contracts?

A. It was placed under their order—they were not in the possession of the vessel that I am aware of.

Q. It was subject to their orders from that on?

A. To their orders.

Q. As a matter of fact, it was in their possession from that on?

A. Well, I don't know; I was on the boat all the time. as manager of the Yukon Transportation Company.

Q. Who employed the crew of the vessel after that?

A. The McGuires.

Q. Who employed Captain Lewis, manager of the "Eugene"? A. The same.

Q. In what capacity were you working on the boat—were you under salary?

A. No, sir, I was under salary for the Yukon Transportation Company.

Q. You say there were a crew of fourteen on that boat going to Alaska?

A. I think that was the number.

Q. It might have been seventeen, might it not?

A. It might have been.

Q. I believe there is some evidence to that effect.

A. I am not sure about that.

Q. Was not that an unusually large crew for such a boat?

A. No, sir, not when you run day and night. It is an unusually small crew for a 24-hour service.

Q. Now ,you say some of that crew had mining outfits? A. Yes, sir.

Q. How many of them?

(Objected to by proctor for claimant as immaterial.)

A. I do not know, but I think about seven or eight.

Q. Had these men paid any passage money?

(Objected to by proctor for claimant as immaterial.)

A. I do not know that they did.

Q. You do not know whether they did or not?

A. No, sir, I do not know.

Q. Do you know whether they received any wages, these fellows that had outfits?

(Objected to by proctor for claimant as immaterial.)

A. I contracted to pay them a certain amount per month, the crew.

Q. Was not that a preliminary that was gone through shipping them on the vessel as a crew, for the purpose of evading the law?

(Objected to by proctor for claimant as immaterial.)

A. I do not know hardly what you mean by that.

Q. I will ask you if these persons who had outfits on the boat did not ship as a crew for the purpose of evading the customs laws.

A. No, sir.

Q. These contracts introduced here in evidence by the claimant represent the rights of the Portland and Alaska Trading and Transportation Company in the premises, do they? A. Yes, sir.

Q. Who paid for the repairs that were made on the vessel at Portland?

A. The Portland and Alaska Trading and Transportation Company under the contract.

Q. Possession was delivered to them prior to the making of these repairs?

A. They never took possession of the boat in the way that I understand, that a man takes possession of property at all.

Q. But they assumed control of it?

A. Yes, sir.

Q. For the purpose of making repairs?

A. Yes, sir.

Q. And for the purpose of this trip to Alaska?

A. Yes, sir.

Q. You knew what they were doing with that boat at all times? A. Yes sir.

Q. You knew of this trip of the vessel that was advertised in connection with the "Bristol" to St. Michaels and from there on up the river?

A. I knew nothing about their advertising that.

Q. You knew of the trip?

A. I knew they were going to make the trip, yes, sir.

Q. You knew of these passengers being carried on the "Bristol" with their outfits? A. Yes, sir.

Q. They were to be transferred at St. Michaels?

A. Yes, sir.

Q. You knew all about that? A. Yes, sir.

Q. Now, the Portland and Alaska Trading and Transportation Company had authority to do that, had not they? A. Yes, I suppose so.

Q. They had authority?

A. According to the contract; whatever authority there is it is in the contract.

Q. The "Eugene," then, was not engaged in any undertaking different from the terms of the contract in doing this, was she?

A. No, not that I know if.

Q. Now, are you a seafaring man? A. No, sir.

Q. You are not? A. No, sir.

Q. Your experience with boats has been inland, inland waters?

A. My experience in working on boats has been on inland waters; I have been on outside waters as a passenger considerably.

Q. Now, you say the "Eugene" was seaworthy when she left Portland?

A. She was seaworthy as any one could make it.

Q. Still, you had no experience with such vessels in going to sea? A. No, sir.

Q. And would not know the effect of the sea on them, would you—you are not a practical seafaring man, you judged the seaworthiness of that vessel at Portland, did you? A. No, sir.

Q. You say you made the trip to Port Townsend all right? A. Yes, sir.

Q. But still you say you broke a cable and also these same trusses gave away? A. Yes, sir.

Q. The trusses gave way in the first place on the trip from Portland to Port Townsend? A. Yes, sir.

Q. These were the same trusses that afterwards gave way out at sea?

A. Strengthened--the same.

Q. They are the same trusses? A. Practically.

Q. And you say the weather between Portland and Port Townsend was all that could be wished?

A. Yes, sir.

Q. It was all right? A. Yes, sir.

Q. Perfectly clear weather, the sun shining and no wind to amount to anything?

A. Not very heavy winds; what I speak about one evening there was a breeze off Destruction island.

Q. When you got to Port Townsend you found that these trusses were not sufficient? A. Yes, sir.

Q. Then you fixed them over? A. Yes, sir.

Q. And it was the giving way of these same trusses out at sea that caused you to turn back, was it?

A. Not so much as the hammering of the bows on the waves in the storm. She is a flat-bottomed boat.

Q. But these are the trusses you mentioned in the direct examination as the chief break-down of the vessel?

A. I did not call them the chief break-down of the vessel, and, as I said in my direct examination, I consider the chief danger lay in the hammering of the bow of the boat, the flat bottom on the waves; as she came down off the wave, her bow at times would come clear down out of the air and come down like a board on a barn floor.

Q. In other words, the difficulty was that this undertaking was not a feasible one, was it?

A. It would have been feasible if it had been the inside passage, as we expected. We never expected anything else.

Q. It would have been a practical one in the best of weather, would it not?

A. Not necessarily the best of weather,

Q. It would have to be good weather?

A. Have to be fair weather?

Q. Now, you do not pretend to say that this was an ocean storm?

A. Not ocean storm for a sea-going vessel, no, sir; it was squally and choppy.

Q. A sea-going vessel would make nothing of going through such a storm? A. Certainly not.

Q. Was the sun shining?

A. No, sir. It was raining very hard at times.

Q. Now, were any of the knees of the "Eugene" broken? A. When?

Q. At the time you turned back?

A. There were some of them cracked, yes, sir.

Q. How many of them? A. I do not know.

Q. Well, approximately.

A. Well, I could not approximate, because I never went in there to examine.

Q. Were there ten of them broken?

A. I don't think so—I don't know.

Q. Now, there might have been?

A. There might have been forty, for all I know, for I never examined, but I do not think so.

Q. Now, Mr. Geer, I would like to have you state whether or not any of these knees were broken before she left Portland.

A. Yes, sir, and fixed with clamps again.

Q. How many were broken?

A. Three or four.

Q. Were there not five?

A. Possibly might have been five.

Q. They were broken before she left Portland?

A. Yes, sir, and fixed.

Q. Fixed with clamps? A. Yes, sir.

Q. Now, you speak of some report that was made there at Alert Bay, I believe; it was after an investigation of the condition of the boat?

A. Yes, sir.

Q. Who was that report made by?

A. I am not certain who that report was made by; there were some officers from the "Bristol" and some pas-

sengers from the "Bristol," and I think Captain Lewis, but I am not positive.

Q. What was the substance or effect of that report, as to her condition?

A. Well, the substance, the effect of the report was that she was unable to proceed on that voyage without being repaired.

Q. You did not exercise any authority on board the "Eugene" during that voyage, did you?

A. Not in the management of the boat, no, sir.

Q. The control of the boat, as to her navigation and trip, was vested in the Portland and Alaska Trading and Transportation Company, was it not?

A. I suppose it was, in one sense, and another sense, it was not.

Q. Who was the manager of that expedition?

A. The Portland and Alaska Trading and Transportation Company was manager of their part of it.

Q. Who was manager for them? A. For them?

Q. Yes.

A. Why, H. P. McGuire seemed to be manager in Portland.

Q. But on board of these vessels?

A. On board of the vessels Captain Lewis had control of the "Eugene," and I was under Captain Lewis on the trip.

Q. But at Alert Bay?

A. That I do not know; I did not see any managers at Alert Bay.

Q. Did you see McFarland?

A. Oh, yes, sir.

Q. Don't you know that he was manager of that company?

A. I know that he purported to be manager of that company.

Q. And Captain Lewis was under his direction, was he not?

A. I suppose so. I do not know. It was their business, not mine.

Q. As to whether or not the vessel should return or proceed depended on the orders given by McFarland or Captain Lewis?

A. I suppose so.

Q. He stood in the place of the Portland and Alaska Trading and Transportation Company as to the directions to be given?

A. So far as I know—I obeyed no directions or orders but Captain Lewis'.

Q. You say the taking of this vessel to Alaska was an experiment. A. Certainly.

Q. Were these passengers and freight taken in that way, or were the passengers informed that that was an experiment?

A. All those that were in Portland were informed that it was an experiment, as far as I know. I knew some of them knew it was an experiment and they were taking chances.

Q. Was it advertised as an experiment or as an assured thing?

A. I do not know; I never saw any advertisements.

Q. Before the passage money was paid there was nothing said about an experiment?

A. I had nothing to do with the passage money; I know nothing about that whatever.

Q. When did you expect to get possession of the vessel again?

A. I expected to get it at Dawson City.

Q. When?

A. After we got to Dawson City; I expected to have possession of the boat at Dawson City.

Q. Then you were to have possession of it jointly with the Portland and Alaska Trading and Transportation Company, were you?

A. No, sir, we were to have complete possession.

Q. Did you enter into a further contract with the Portland and Alaska Trading and Transportation Company?

A. We merely entered into a contract by which they were allowed a part of the receipts. The traffic contract—the contract shows there what it is; we were to have all our local business, and there was no local business to go to the Portland and Alaska Trading and Transportation Company; that was ours—the Yukon Transportation Company.

Q. So that when you testified to what was said before these two contracts were signed, you did not mean to add anything to what is contained in the contract, do you?

A. There was some talk about things that were not expressed in the contracts.

Q. But these embody your agreement, do they not?

A. They embody the main part of the agreement.

Q. There was no misunderstanding, and there is nothing misleading or ambiguous about the contract?

A. None that I am aware of.

Q. Were these papers filed in the collector's office in the port of Portland?

(Objected to by proctor for claimant as immaterial.)

A. That I don't know.

Q. You don't know about that? A. No, sir.

Q. Do you know of the signing of the contract between the Portland and Alaska Trading and Transportation Company and of F. C. Davidge & Company, of Victoria? A, No, sir, nothing whatever.

Q. You knew they had entered into an arrangement with the steamship 'Bristol"?

A. I understood so; I knew nothing of my own knowledge.

Q. You made no objections to that?

A. No, sir.

Q. Or any further investigation?

A. No, sir.

Q. I notice here a sort of supplement or addition to this contract of August 7th, 1897, pasted onto the cover; do you know anything about the signing of that paper?

A. Yes, sir.

Q. You say you do know something?

A. Yes, sir.

Q. When was that signed?

A. Oh, I do not remember the date.

Q. Were you present when it was signed?

A. No, sir.

Redirect Examination.

Q. (By Mr. FLANDERS.) Captain Lewis was in charge of the "Eugene," was he? A. Yes, sir.

Q. Was he the man from whom you and those on the "Eugene" took orders?

A. Yes, in the management of the boat, the handling of the boat.

Q. Did the "Eugene" take any orders from McFarland? A. Not that I am aware of.

Q. Was Lewis a seafaring man?

A. Yes, he purported to be.

Q. Do you know whether or not he had any experience as a navigator in the waters of Alaska?

A. Yes, I understood such to be the case.

Q. You understood so at the time? A. Yes, sir.

Q. Well, did you know anything of the McGuires or anybody publishing advertisements in the Seattle papers?

A. No, sir, I knew nothing at the time.

Q. The authority, as I understand, that the McGuires had is all contained in those two contracts to which you have testified? A. Yes, sir.

Q. Do you know anything of your own knowledge about any representations that were made to the libelants in this case? A. I do not.

Q Do you know anything whatever, what the contract was between the Portland and Alaska Trading and Transportation Company and the libelants?

A. I do not.

Q. You say Captain Lewis was in charge of the "Eugene"? A. Yes, sir.

Q. Where did he take charge of the "Eugene"?

A. At Portland, Oregon.

Q. Before she went to Victoria?

A. Yes, sir.

Q. Did he stay on the "Eugene" until she got to Victoria or not? A. Yes, he did.

Q. All the time or not? A. Yes.

Q. Were you with him? A. Yes.

Q. (By Mr. HOGAN.) If the McGuires, representing the Portland and Alaska Trading and Transportation Company, did publish advertisements here, they did nothing in doing that contrary to their agreement, did they? You found no fault with them in violating the agreement in any way—did you ever claim that they violated the agreement with you before the abandonment of the voyage?

A. I never knew anything about the publication of such matter until this libel suit.

Q. They had a perfect right to do that under their contract, did they not?

A. They had a perfect right, to a certain extent.

Q. They had the use of this vessel for that voyage and whatever legal business they chose to carry on, did they not?

A. They had the use of the vessel from the mouth of the Yukon to Dawson City.

Q. And from Portland up, did they not?

A. They were not to use the vessel from Portland up for any purpose.

Q. But you say they did carry freight?

A. They only had a few outfits of some of the crew.

Q. Was that a violation of their agreement?

A. It was not in violation of the agreement to carry outfits of the crew on the boat; not that I was aware of.

Q. (By Mr. FLANDERS.) You say the use of the boat was to begin at St. Michael? A. Yes, sir.

Q. And end at Dawson City? A. Yes, sir.

Q. All their possession in the boat at Portland was for what purpose?

A. The possession of the boat in Portland was for the purpose of fitting her up and taking her up to St. Michaels, where they were to have the use of the boat from St. Michaels to Dawson City, and for having the use of the boat from St. Michaels to Dawson City they were to go to the expense of fitting her up for the sea voyage and take her to St. Michaels free, as far as we were concerned.

(Testimony of witness closed.)

Captain FRANCIS B. JONES, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (By Mr. FLANDERS.) What is your residence?

A. Portland.

Q. Your occupation? A. Steamboating.

Q. How long have you been steamboating?

A. Eighteen years.

Q. Are you or are you not familiar with the construction of steamboats? A. Yes, sir.

Q. Know all about steamboats?

A. Pretty near. I have built three or four, had them built. :

Q. Are you the Francis B. Jones whose name is signed to the agreement of July 30, 1897, and August 7th, 1897, intraduced in evidence in this case? A. Yes, sir.

Q. You may state whether or not at the time of entering into of these agreements you had any interest in the "Eugene." A. Yes, sir.

Q. What did you do with your interest after that time?

A. Well, I have got my interest in her yet.

Q. In what way have you your interest in her yet?

A. Well, in the first place Geer owned a share and I owned a share, so we entered into a contract and sold it to the Yukon Transportation Company.

Q. And took stock? A. And took stock.

Q. Now, what position do you hold in the Yukon Transportation Company?

A. I am president.

Q. What position did Geer hold in it?

A. He has been general manager,

Q. How long have you held these respective positions?

A. Ever since we entered into that contract.

Q. And transferred the boat?

A. Yes, sir, ever since the transfer of the boat.

Q. Are you familiar with the stockholders of the Yukon Transportation Company? A. Yes, sir.

Q. Have any of the stockholders of the Portland and Alaska Trading and Transportation Company any interest in the stock of the Yukon Transportation Company?

A. No, sir, not a dollar's worth.

Q. Has the Portland and Alaska Trading and Transportation Company or any of its members any interest in the "Eugene" other than whatever interest they may have by virtue of these two contracts to which I hav referred? A. No, sir.

Q. Did they have any possession of it for any purpose except as indicated by the contracts to which I have referred A. No, sir.

Q. Are you familiar with the circumstances under which these contracts were entered into, and do you know the parties to them? A. Yes, sir.

Q. What use was to be made of the "Eugene" under that, and for what purpose were the McGuires to have the use of her?

(Objected to by proctor for libelant, because it is not the best evidence.

A. For what purpose?

Q. For what purpose were they to have the use of her, what was the use contemplated by the owners of the "Eugene" under this agreement?

A. They made a bargain with us to fix up that boat seaworthy at their expense, and take her to the mouth of the Yukon, and tow her or convey her up there for the use of her up the Yukon river, one trip.

Q. For whatever they could make out of the "Eugene," for the trip up the Yukon, from the mouth up to Dawson?

A. What they could make on one trip this last fall.

Q. Were they to have the use of her for the purpose of transporting freight and passengers from any other point than from the mouth of the Yukon?

Objected to by proctor for libelant for the reasons last stated.)

A. No, sir, they were not to do anything else with her; they had no right to use her for anything else than to take her to the Yukon river, because we were talking about that a while afterwards, and they wanted to take her on the Stickeen, and they said they had no right to take her there, because they had no right to do it in place of bringing her back here. They thought they could take her there and run her, but they said they knew they had no right to do that under the contract.

Q. Did you see the repairs that were put upon the "Eugene" for the voyage? A. Yes, sir.

Q. What was her condition as to her being a seaworthy steamboat when these repairs were begun?

A. Well, so far as my judgment was, it was pretty good. It was pretty well done.

Q. I mean before they started in on the repairs?

A. Before?

Q. What was the age of the "Eugene"?

A. Three years old.

Q. What was her general condition?

A. Pretty good condition; she had a few knees cracked in her; they were not broken clear in two; they were cracked. They put clamps on the side of them, and made them as strong as they ever were.

Q. That made them as strong as they ever were?

A. Yes, sir. They were made as good as ever.

Q. You say you supervised fixing her up for the sea trip?

A. They put a keelson in her from the bottom clear up to the deck, to make her stiff.

Q. Did you superintend or supervise this?

A. I superintended a good deal of the boat, but they had a regular ship carpenter to superintend it, and a good one.

Q. How were these repairs done, what sort of work went into them and what sort of material?

A. They were done in good shape; it was all done good.

Q. It had to be done under the contract, to your satisfaction? A. Yes, sir.

Q. Was it done to your satisfaction?

A. Not as well as I expected; so far as my judgment for a seaworthy boat, it was done all right.

Q. Was or was not the sea trip of the "Eugene" an experiment or not?

A. Well, it was considered an experiment, because there had never been anyone taken up there before, and no one knew whether she could be taken up or not.

Q. You took the chances, the owners of the "Eugene" took the chances of getting her up there?

A. Yes, sir, we took the chances of getting her up there. If the boat had been lost, we would have lost her, but they had to use the best possible means under the contract to get her there.

Q. Do you know this libelant, Charles Ruff?

A. No, sir. I do not know any of the passengers.

Q. Do you know the libelant, Jacobi.

A. No, sir.

Q. Did the Yukon Transportation Company get any of the passage money of these passengers?

A. No, sir.

Q. Did you have any dealings with the Yukon Transportation Company, have any dealings with the passengers? A. No, sir, none at all.

Q. You are familiar with the business of the Yukon Transportation Company? A. Oh, yes.

Q. Do you know anything about these advertisements that are introduced in evidence here by the libelant, alleg-to have been published at Seattle by the McGuires?

A. No, I do not know.

Q. Did they have any authority from the Yukon Transportation Company at Portland to publish any of these articles, or to bind the boat by them?

A. No, they did not have any authority whatever.

Q. Did you see the "Eugene" after her return to Seattle? A. Yes, sir.

Q. When she went on the ways? A. Yes, sir.

Q. What was her condition?

A. Well, she was leaking considerably around the bow where her seams had been opened and the oakum worked out.

Q. What was the condition of the timbers in the bow?

A. Well I did not go inside of her to look.

Q. Could you see the oakum worked out?

A. Yes, that is all I saw about it; I did not have time to go in her; I had to go to Victoria. I was over there when they had her on the ways there for a few days after they hauled her out and examined her, and they got caulking and went to work and caulked her all the way over.

Q. Judging from what you saw at that time, that is, when she was on the ways, was the condition of the "Eugene" such that she could with safety have proceeded further on that voyage?

A. I do not think she could without being caulked and fixed up again; the "Eugene" was supposed to go up there in good order.

Q. How was her condition when you saw it, compared with her condition when she was leaving Portland?

A. Oh, I don't know; I could not tell much about the condition of the boat, you know, unless you go through and examine her.

Q. Well, judging from what you saw.

A. Oh, when she left Portland, she was all right. She had been caulked and was in good shape, and when I saw her here she looked as though her oakum had worked up considerably around the bow along the knuckles.

Q. You saw her just before she left Portland, after the repairs were completed?

A. Yes, sir, I saw her all the time she :was being repaired.

Q. What was her conditon then as to her ability to stand the trip?

A. She was in good condition then. I took her to Astoria myself.

Recross-Examination.

Q. (By Mr. HOGAN.) Were you one of the incorporators of the Portland and Alaska Trading and Transportation Company?

A. No, sir. I signed my name when they were got up in the first place to incorporate, but that was all.

Q. You signed the articles of incorporation?

A. Yes, in the first place, for them to organize.

Q. Are you the F. B. Jones mentioned in that letter (showing letter to witness)?

A. I do not know whether I am or not.

Q. I will ask you if the incorporators of that company were not H. P. McGuire, E. B. McFarland, John Yocum, W. W. McGuire, F. B. Jones, and W. S. Mason.

A. This might have been. I signed my name to the incorporation in the first place They were in a hurry to get the boat and get to work.

Q. You signed your name to the articles of incorporation of the Portland and Alaska Trading and Transportation Company?

A. I don't know whether that was it, but it was just something to orgnize in the first place.

Q. Please read that letter over and refresh your memory.

A. I guess I put my name to it, and W. S. Mason the same as I did. But he has not a dollar's worth of stock in it.

Q. This letter correctly states the names of the incorporators of that company as far as you know?

A. Yes, when incorporated.

Q. And you are the F. B. Jones mentioned in this letter? A. Yes, sir, I suppose so.

Q. Now, to refresh your recollection, you were a member of the Portland and Alaska Trading and Transportation Company?

A. I don't know whether you call it a member or not; I signed my name there for the purpose of organizing it; I don't know whether you call that a member or not; I was not an officer.

Q. Do you know what the capital stock of the company was?

A. I did not know anything about the stock.

Q. Well, then, you are mistaken in your testimony as a matter of fact, Mr. Jones, when you say that none of the members of the Portland and Alaska Trading and Transportation Company were members of the Yukon company? A. Stockholders I said.

Q. But the members—you are a member of that company?

A. No, sir, I don't consider that I am a member of that company; I deny being a member of that company in any shape; if I did sign my name, I did not take a dollar's worth of stock, and I don't know anything about what their company consists of.

Q. When was the Yukon Transportation Company incorporated?

A. Well, I could not say just when—somewheres near about the 6th of August, somewhere along there.

Q. Shortly after the other? A. Yes, sir.

Q. Now, did the McGuires not undertake this trip to Alaska in connection with the steamship "Bristol" to violate the terms of their contract with you in any way before they turned back—up to that time, had they violated the contract?

A. Well, some of them violated the contract a whole lot. I don't know who done it, whether the "Bristol" themselves or the McGuires. The first had an option on two other boats.

Q. How did they violate it?

A. They did not take either one of the others; they waited for the "Bristol." They were to take her right away; they didn't do it. She lay there seven or eight days at Port Townsend waiting, and they did not take her according to contract at all.

Q. Their breach of contract consisted in the delay?

A. Yes, sir.

Q. But as to the perfecting of arrangements with the "Bristol" and the transportation of these passengers, that was no breach of the contract, as you understood it, was it? A. No. I don't know as it was particularly.

Q. They had the right under the contract, as you understood it, to do that?

A. Well, I think if you will get the contract between the "Bristol" and the McGuires, that the "Bristol" was to tow them on the inside passage, and they never done it.

Q. That was between them and the "Bristol"?

A. Yes, sir.

Q. Did the McGuires or the transportation company, so far as this expedition was concerned, and the sale of tickets and passengers here, that was no breach of their contract with you, was it?

A. I don't know anything about the sale of tickets.

Q. Do you claim that contract was broken by the sale of tickets to passengers, or the attempt to transfer passengers from here to Dawson City?

A. They did not attempt to transport any passengers on the "Eugene."

Q. What they did then in relation to these passengers was no breach of the contract in itself, if nothing else occurred, that is, they had that right under the contract?

A. I suppose they did—what do you mean, a right to transport the passengers in the way that they did?

Q. Yes, sir, as far as they had gone, or further if the expedition had been successful, but the breach of the contract that you claim consisted in the delays?

A. Yes, sir. That is the breach of the contract that I claim delays.

Q. And not the failure to deliver her up there. You say you took the whole risk of getting her through safely?

A. I took the risk myself of the boat in case of rough weather or anything.

Q. You say it was an experiment.

A. Well, I claim it was an experiment on my part.

Q. And you took the chances of the result?

A. I took the chances of getting the boat up there in the first place; I thought that we were going to start off

right away and get through before the weather got bad, but they waited too long, until the weather got bad.

Q. When was the possession of the boat delivered to the McGuires or the Portland and Alaska Trading and Transportation Company?

A. I suppose they took possession as soon as they started from Portland with it; they had their own captain—Captain Lewis had possession of her; of course, I took her down to Astoria for him, because he did not know the river very well, but he had charge of the boat.

Q. They employed their own captain and crew and pilot? A. Yes, sir.

Q. Had full charge of the navigation of the vessel from that on?

A. Yes, sir, they had full charge of her.

Q. She has never been back in your possession since then?

A. Yes, I claim we have got possession of it now, excepting the marshal.

Q. But other than the possession you have now, jointly with the marshal, she has never been back in your possession since?

A. Yes, she was in our possession, except the marshal's.

Q. I say, other than that character of possession, she has never been—that is, she has never been formally turned back to you by the McGuires?

A. Yes, I claim that Captain Lewis had charge of the boat, the management of the boat, and that he turned her over to Captain Geer at Port Townsend.

Q. How long before she was libeled?

A. About a week or ten days, I guess.

Q. Did you ever do any business before with the McGuires? A. Very little.

Q. How long did you know them down there?

A. Did not know them very long.

Q. They are old residents of Portland?

A. They have been there a good while; I did not happen to get acquainted with them.

Q. You are an old resident there?

A. I am steamboating; that don't signify that I get acquainted with people doing business in the city; I am on the Columbia river all the time. I did not know them but a little while before.

Q. I refer you to this addition to this contract of August 7th, 1897; is that your signature to that?

A. Yes, sir, it looks like it.

Q. Did you write the name of the company there?

A. No, that is not my writing.

Q. You do not identify that as your signature?

A. No, I don't, but still it looks a little like it, but I don't think it is.

(Proctor for libelant desires to object to the introduction of the slip of paper attached to the contract of August 7th, 1897, it having been introduced without the knowledge that it was attached to the contract, and we ask now to have it stricken out upon the ground that Mr. Jones cannot identify the signature to the paper which purports to have been signed by him.)

Q. Now, the strain and damage that you noticed about

the "Eugene" on her return to Seattle may have been caused largely by the towing of the vessel, might it not? A 900 foot cable is pretty heavy.

A. I suppose the towing through rough weather might do it. I think that might be possible, but I could not say as to that. I don't know how that would be.

Q. Opinions seem to be that the towing was as bad as the weather?

A. The opinions seem to be that the towing was uncalled for.

Q. What would a cable 900 feet weigh?

A. I don't know. I don't know how big it was.

Q. That would be a very heavy cable for that vessel?

A. Yes, sir—not amount to a great deal.

Redirect Examination.

Q. (By Mr. FLANDERS.) Have you any stock in the Portland and Alaska Trading and Transportation Company? A. No, sir.

Q. Did you ever have any stock in that company?

A. No, sir, never had any.

Q. Were you an officer or director of the corporation?

A. No, sir.

Q. How did you happen to sign the articles of incorporation?

A. Well, I was called there to see them about this thing making a dicker, before we entered into any certain contract, and they wanted to incorporate a company. And they asked me to sign it so that they could incorpo-

rate and go ahead with it. They got Mason to sign it in the same way, and this other man, Yocum, down there, in the same way. I never had a dollar in it.

Q. Have you ever been at any of their meetings?

A. Never attended any meetings.

Q. Ever sign any papers?

A. No, sir.

Q. Now, Captain, you have been cross-examined about the contract between the McGuires, or rather the Portland and Alaska Trading and Transportation Company, and Davidge & Company; did you ever see that contract?

A. No.

Q. Do you know what the terms of it was?

A. Only what they told me.

Q. What did they tell you?

A. They told me that they had contracted with them to take them, and they were to leave Victoria on the 22d of August. And they were in a hurry to get us over there, and we got over here and lay for seven or eight days—laid till about the 30th.

Q. That's all you know, what the McGuires told you?

A. Yes.

Q. Do you know anything about the method or manner in which McGuires, Davidge or anybody sold tickets here in Seattle— do you know anything about the way in which they sold them to persons?

A. No, all I know about it is what I heard; I just heard—they told me they were selling them on the "Bristol" to go to St. Michaels, and from St. Michaels they

were to be transferred to the "Eugene," if they got her up there.

Q. Now, you don't know yourself much about how these transactions were had by the Portland and Alaska Trading and Transportation Company with these passengers? A. No, I do not.

Q. Of your own knowledge?

A. No, I don't know anything about it; I know in Portland how they were offering to sell them to passengers.

Q. What were they doing there?

A. Why, when I have been in there, the passengers have asked them, suppose that they didn't get through wit the "Eugene," what they were going to do with them, and they told them they would have to take the same chances as well as themselves, but they expected to get hr through, they thought there would be no doubt but what they would get her through, but they could not guarantee against any elements.

Q. Did you ever authorize or did the owners of the "Eugene" ever authorize the Portland and Alaska Trading and Transportation Company to warrant that the "Eugene" would arrive at St. Michaels?

A. No, sir.

Q. Or to sell tickets on the "Eugene" to begin at any other point than St. Michaels if she got there?

A. No, sir, I did not.

Q. Did they have any authority to deal with the "Eugene" other than as embraced in these two contracts?

A. No, sir, not that I know of. I had been dealing

with them myself pretty much; they didn't have any authority to deal in any other way than as in these contracts.

Q. From what point to what point did they have authority to sell tickets on the "Eugene"?

A. From St. Michaels to Dawson City.

Recross-Examination.

Q. (By Mr. HOGAN.) Now, Mr. Jones, it was understood with the McGuires that the "Eugene" would have to be towed there by some vessel?

A. Either convoyed in some way.

Q. And it was talked of that that vessel would take passengers, was it not? A. Yes, sir.

Q. Even before this agreement was signed?

A. Yes, sir.

Q. And secure passengers? A. Yes, sir,

Q. And she would have the "Eugene" in convoy or tow? A. Yes, sir.

Q. And if towed to St. Michaels there the passengers would be transferred to her; now, that whole arrangement was talked over, and that was the very purpose of their getting possession of the 'Eugene"?

A. Yes, to handle passengers and freight.

Q. You knew afterwards they were selling tickets for the voyage?

A. I knew they sold tickets, yes. They did not sell tickets on the "Eugene," I don't think.

Q. Well, for the voyage?

A. They sold them on the "Bristol."

Q. They were taking passage money from passengers to be delivered at Dawson City?

A. I do not know whether they took passengers, you know, to be delivered when there or not.

Q. You said you heard some passengers at Portland talking?

A. Oh, I heard them come in there and talk to the manager there or the ticket agent there.

Q. About the trip to Dawson City?

A. McFarland and even in Davidge's office both.

Q. That was a trip to Dawson City they were talking about?

A. Yes, a trip through to Dawson City; they came in there to find out what the assurances were of the company that they would get the "Eugene" through, and they told them that they could not guarantee anything against the elements, but they expected to get her through; if weather was good, they would get her through.

Q. That was at Portland? A. Yes ,sir.

Q. Now, you made no objections to their selling these tickets?

(Objected to by proctor for claimant as irrelevant.)

A. Oh, no.

Q. You considered they were authorized to do that under the contract, did you not?

(Objected to by proctor for claimant as immaterial.)

A. Well, I suppose they had, yes. I don't know; I suppose they had a right to sell tickets.

Q. They were to get the "Bristol" or some other ves-

sel to tow her up there, and take the passengers and baggage to St. Michaels, and from there they would be transferred?

A. They sold on the "Bristol." I don't know whether they sold any on the "Eugene" or not; I do not think they did.

(Testimony of witness closed.)

(Proctor for libelant offers in evidence letter from secretary of state of Oregon, marked Libelant's Exhibit "AE.)

Hearing adjourned until Nov. 20, 1897, 2 P. M.

C. W. GOULD, recalled on behalf of the claimant

Q. (By Mr. FLANDERS.) Mr. Gould, you are the Mr. Gould who testified on behalf of the libelants before the commissioners, are you not?

A. I testified—I do not know on whose behalf.

Q. You are the Mr. Gould from whom Ruff and Jacobi said they bought their tickets? A. Yes.

Q. You are the C. W. Gould? A. Yes.

Q. These tickets were signed by Mr. McFarland, as general manager of the Portland and Alaska Trading and Transportation Company, were they?

A. Yes, sir, as I recollect.

Q. Delivered to you signed?

A. Yes, sir.

Q. You sold tickets to them and others?

A. Yes, sir.

Q. Were you in charge of the Seattle office?

A. Mr. McGuire was there and had as much to do or say, I guess, as anybody; but I was supposed to handle the money and the tickets and sell the tickets.

Q. I will ask you whether or not you ever guaranteed to these libelants or anybody else that the "Eugene" would in fact survive the trip?

A. No, sir, I never guaranteed to anybody that they would survive, absolutely refused to guarantee anything.

Q. Did you ever have any conversation with any of these passengers in regard to the chances of the "Eugene" arriving at St. Michaels?

A. Yes, sir.

Q. What did they say to you and what did you say to them?

A. Nearly every passenger with whom I conversed upon requesting information would ask me if we were guaranteeing to take them through to Dawson City. My answer always was that I could not guarantee anything. That they would have to take their own risk, and if they did not feel disposed to run any risk I would advise them not to go. Mr. McGuire, on the other hand, would tell the passengers, and did tell them in my presence, that he would take them through, providing they stay with the boat.

Q. With the boat?

A. Yes, sir.

Q. Were you ever authorized to guarantee that the boat would arrive at St. Michaels, the "Eugene" would arrive at St. Michaels? A. No, sir.

Q. As I understand you, you never did promise that she would make the trip?

A. I never did promise that, sir.

Cross-Examination

Q. (By Mr. HOGAN.) You mean that you yourself, personally, Mr. Gould, did not make any guarantees?

A. That is what I mean.

Q. Did you know that guarantees were made by the McGuires and others, or what amounted to guarantees, if they stayed by the boat they would get through?

A. A great many asked the McGuires if they would guarantee to take them through; I heard him tell them that he would take them through if they would stay with the boat.

Q. He told them that the boat was bound to reach there this fall, did he not?

A. Well, he told them that he thought there was no doubt but what it would reach there; he said that he could not guarantee anything; he could not guarantee that the boat would get there, as it might be an impossibility.

Q. Well, he spoke to them in the line of these advertisements in the "P. I.," did he not? That the vessel would arrive there on the 11th or 15th of September—that was his talk, was it not?

(Objected to by proctor for claimant as immaterial.)

A. When it comes right down to the matter of fact, I could not say that I ever heard him say that the boat would positively reach Dawson City last fall.

Q. But did not he give passengers to understand that it would in all his talks with them—do not you believe that they received the impression from the conversation with him that they would reach there this fall?

(Objected to by proctor for claimant as incompetent.)

A. Well, as far as my opinion goes, I think they did.

(Proctor for claimant moves to strike the answer of the witness because it is a matter of opinion.)

Q. The McGuires were noted for their talk, were they not—that is, they were inclined to make big promises, were they not?

(Objected to by proctor for claimant as irrelevant.)

A. Well, do you wish just my opinion on that? I cannot vouch for other people's opinions.

Q. Well, what you saw there in your office of their ways of carrying on this business, the sale of tickets to passengers.

A. Well, I think they were able to represent their interest beyond question.

Redirect Examination.

Q. (By Mr. FLANDERS.) You say you made no guarantee yourself that the boat would reach Dawson City. Did you make any guaranty or promise on behalf of the "Eugene" herself or on behalf of the Portland and Alaska Trading and Transportation Company that she would reach there?

A. I made no guarantee on behalf of anyone for their boat.

Q. (By Mr. HOGAN.) Now, as a matter of fact, Mr.

Gould, you considered it your business to merely sell tickets and when anything pertaining to the voyage came up it was referred to McGuire, was it not?

A. Yes, when anything came up in regard to the responsibility of the boats—for instance, as to getting the "Eugene" up the river and other matters that I did not think come within my jurisdiction as an agent for the sale of tickets—the passengers were referred to the McGuires. I says, "Here's the owner of the 'Eugene'; let them answer these questions themselves."

Q. And you were there to receive the money and take care of it and deliver the tickets?

A. I was there simply to receive the money; I did not suppose that I would have handled the tickets at all if it had not been for securing the charter money to the Davidges.

(Testimony of witness closed.)

Capt. JOEL P. GEER, recalled on behalf of claimant:

Q. (By Mr. FLANDERS.) I hand you this paper and ask you what it is.

A. That is a license, license of the steamer "Eugene"; also indorsements for masters.

Q. A portion of the papers of the "Eugene" which you have in your possession as her master?

A. Yes, sir.

Q. You are required to keep this on board of the vessel? A. Yes, sir.

(Proctor for claimant offers paper in evidence. Objected to by proctor for libelants as immaterial. By

agreement copy substituted for original and original withdrawn.)

Claimant's Exhibit No. 4.

Permanent
License No. 6.

Official number.
Numerals.
136, 424.

The United States of America.

Art. 31, Customs Regs. 1892. Cat. No. 541.
Sec. 4321, Rev. Stats.

License for Enrolled Vessel.

License for carrying on the Coasting Trade.

In pursuance of Title L: "Regulations of vessels in domestic commerce," of the Revised Statutes of the United States, F. B. Jones, of Portland, Oregon, president of the Yukon Transportation Company, of Portland, Oregon a corporation, and C. H. Lewis, of Portland, Oregon, master, that the steamboat called the "Eugene," whereof the said C. H. Lewis is master, burden 271 tons and 88 hundredths, as appears by her enrollment, number three, dated at District of Willamette, August 18, 1897, shall not be employed in any trade, while this license shall continue in force, whereby the revenue of the United States shall be defrauded; and having also sworn that this license shall not be used for any other vessel, or for any other employment than is herein specified, license is hereby granted for the said steamboat called the "Eugene" to be employed in carrying on the coasting trade for one year from the date hereof, and no longer.

This license does not grant the right to fish for mack-

erel, other than for what is known as Spanish mackerel, between the first day of March and the first day of June, inclusive, of this year.

Given under my hand and seal at the Port of Portland, Oregon, in the District of Willamette, this eighteenth day of August, in the year one thousand eight hundred and ninety-seven.

[Collector's Seal] THOMAS J. BLACK,

No. Collector of Customs.

Naval Officer.

"Indorsement of Change of Master.

District of Puget Sound,

Port of Port Townsend, Sep. 9, 1897.

Joel P. Geer, having taken the oath required by law, is at present master of the within named vessel, in lieu of C. H. Lewis, late master.

CHAS. MILLER,

Dep. Coll. of Customs."

(Indorsed:) "Permanent license for enrolled vessel. License No. 6 of the steamboat 'Eugene,' 271.88 tons. Issued at the port of Portland, Oregon, District of Willamette, Aug. 18, 1897."

Q. I hand you this paper and ask you what it is.

A. It is authority for me to act as manager.

Q. Handed you by whom?

A. By the Yukon Transportation Company.

(Paper offered in evidence by proctor for claimant. Objected to by proctor for libelant as irrelevant and immaterial. By agreement, copy of document inserted in the record and original retained by witness.)

Claimant's Exhibit No. 5.

"Know All Men by These Presents, that Joel P. Geer was at a meeting of the directors of the Yukon Transportation Company, of Portland, Oregon, appointed manager of said company, with the power and authority to take charge of and manage the property of said corporation in Alaska and the British Northwest possessions, and especially the steamboat 'Eugene,' and likewise to act as captain of said vessel, and to discharge the duties usually appertaining to such office.

In witness whereof, the said Yukon Transportation Company of Portland, Oregon, has duly caused these presents to be signed by its president and secretary, and its corporate seal to be hereto atached, this 16th day of August, 1897.

YUKON TRANSPORTATION COMPANY OF PORTLAND, OREGON,

By F. B. JONES, President.

YUKON TRANSPORTATION COMPANY OF PORTLAND, OREGON,

[Corporate Seal] By GEO. GOOD, Secretary."

Executed in presence of:

G. M. Stearnes.

Q. Now, what was the draught of the "Eugene" at the time she turned back?

A. I think about 26 inches.

Q. She had no freight aboard, as I understand?

A. No, sir, only the outfits for the crew.

Q. Do you know what representations may have been

made by either H. P. McGuire or W. W. McGuire or Mr. Gould to any of these people who purchased tickets?

A. I do not.

Q. Did they have any other control over the boat other than the control that they might have had by virtue of these two contracts that are in evidence here?

A. None whatever.

Q. Did you ever authorize them to represent to any purchasers of any tickets that the "Eugene" would in fact arrive at St. Michaels and there undertake the voyage to Dawson City?

A. No, sir, and it was expressly understood between us that it was very likely that she might not arrive, and they were taking that risk.

Q. Would or would not any such representations, if made, have been in violation of your contract and your understanding?

(Objected to by proctor for libelant as calling for a legal conclusion.)

A. Yes, sir, in my opinion I should consider it would be a violation.

Cross Examination.

Q. (By Mr. HOGAN.) This license purports to have been issued August 18th, 1897, at Portland?

A. Yes, sir.

Q. Were there any charges attached to the issuance of that license? A. No, sir.

Q. This license was obtained for the purposes of this trip, was it not?

A. No, sir; that license was obtained when the boat changed ownership from F. B. Jones and myself to the Yukon Transportation Company, and that always has to be done.

Q. Was she licensed before for the coasting trade?

A. Yes, she had exactly the same kind of a license as that.

Q. The same license before?

A. Yes, the same exactly.

Q. This license in no way abrogated or changed the contract which you had made with the McGuires?

A. Nothing to do with that contract.

Q. It left that contract valid still?

A. The contract stood just the same.

Q. And the rights of the original owners who made the contract with the McGuires, these rights were transferred to the Yukon Company, subject to the contract with the McGuires? A. Yes, sir.

Q. So you considered that the matter stood just the same as if the Yukon company had made that contract with the McGuires? A. Yes, sir.

Q. Do you know whether these contracts were filed with the collector down there?

(Objected to by proctor for claimant as immaterial.)

A. Not to my knowledge.

Q. The master of the vessel here mentioned in this license was C. H. Lewis. He was employed by the Portland and Alaska Trading and Transportation Company?

A. Yes, sir.

Q. At the time this license was obtained he was in their employ? A. Yes, sir.

Q. The vessel was in their possession at that time?

A. As I stated yesterday, to a certain extent the vessel is always in the possession of the Yukon Transportation Company since that company has been formed, and was so recorded on the books and never was recorded any place else.

Q. But the Portland and Alaska Trading and Transportation Company had control of the vessel?

A. Yes, sir.

Q. They did have control? A. Yes, sir.

Q. At the time this license was obtained?

A. Yes, sir.

Q. They were fitting her up at that time, were they?

A. Yes, sir.

Q. At their own expense? A. Yes, sir.

Q. And they had employed a crew and were paying them? A. Yes, sir.

Q. Had complete charge and control of the navigation of the vessel on the trip?

A. Yes, but they were not paying all of the crew.

Q. I understand nobody was paying a portion of the crew.

A. I do not know about a portion of the crew; I know the Yukon Transportation Company was paying a portion of it.

Q. A portion of the crew was paying them, I understand?

(Objected to by proctor for claimant as immaterial.)

A. No, sir.

Q. You were on board of the "Eugene" at the time when she was at Comox and when she put out of there for Alaska, were you? A. Yes, sir.

Q. She had been seized by the Canadian officials at that place?

(Proctor for claimant objects as immaterial and irrelevant.)

A. That is what I understood.

Q. She escaped from them, did she not?

A. She left; I do not know anything about her escaping. I had nothing to do with it whatever. I was over on the "Bristol," and some one told me that the "Eugene" was going to leave; I came over and she left; I was not at the wheel.

Q. You were on board of her when she left?

A. I was on board when she left. I was on the "Bristol" when I heard she was going to leave.

Q. Did you see the Canadian official aboard of her?

A. Yes, I was on board of her.

Q. Had he tacked up a notice? A. No, sir.

Q. Had he served any notice there?

(Proctor for claimant objects as immaterial and irrelevant, and desires the objection to apply to all this line of examination.)

Q. Served no papers? A. Not on me.

Q. You understood that he had attached her?

A. I understood that.

Q. How long after that did she put out?

A. I don't know; about 18 or 20 hours, I should judge—possibly more.

Q. In the absence of the officials of the Canadian government? A. Yes, sir.

Q. What hour of the day was that?

A. When we left?

Q. Yes, sir. A. I think about 11 o'clock.

Q. You made no objection to the McGuires on account of their employing a vessel on this trip in the manner they did, did you? A. No, sir.

Q. You considered that that was in accordance with that contract, did you?

A. No, sir; they were to have a lighter vessel to tow her.

Q. Otherwise was that the only objection?

A. There was another objection; they were to take the inside passage, and we strenuously objected to their doing anything else.

Q. Could this vessel have made the trip if you had taken the inside passage?

A. That I do not know, I thought so; she would have stood a great deal better chance to have made the trip on the inside passage. As a matter of fact we started a week or ten days later than the agreement was, and I protested at the time we started.

Q. It is your opinion that she could have made the trip if they had taken the inside passage?

A. She may, but it was very late in the season to attempt to make the trip at all; I protested against leav-

ing so late in the season by telegram from Port Angeles to Victoria.

Q. Still you went on the voyage?

A. We went on the voyage.

(Testimony of witness closed.)

Capt. F. B. JONES recalled on behalf of claimant:

Q. (By Mr. FLANDERS.) Do you know the circumstances under which these libelants bought tickets from Mr. Gould or the McGuires here?

A. No, I don't know anything about here in Seattle.

Q. Do you know any representations that were made by any of these persons to them?

A. No, sir, I do not know of any.

Q. Did you ever give the Portland and Alaska Trading and Transportation Company or Davidge & Co., or any of their officers or agents, any authority to warrant or represent that the "Eugene" would in fact arrive at the Yukon river or do anything more than to make the attempt?

(Proctor for libelants objects as irrelevant and immaterial.)

A. No, sir, I did not give them any authority whatever.

Q. Did any of the owners of the "Eugene" ever give them such authority?

A. No, sir, never any of the owners of the "Eugene" had any right to do that.

Cross-Examination.

Q. (By Mr. HOGAN.) You say it was the intention,

Mr. Jones, when this boat was let to the McGuires that they would carry passengers in this manner to Alaska, was it not? A. No, sir, it was not.

Q. Did they not contemplate carrying passengers—I mean on board another vessel which would tow the "Eugene" up?

A. They expected to carry passengers on the "Bristol" or on some other boat.

Q. It was the intention to carry them on the "Bristol" or some other boat having in tow the "Eugene"?

A. Well, towing her or convoying her, one of the two,

Q. And so far there was no breach of the contract on the part of the McGuires in undertaking to transfer passengers in that manner, taking them aboard the "Bristol," having in tow the "Eugene" or convoying the "Eugene"?

A. There was no contract that they were to carry anything on the "Eugene" at all until they got to the mouth of the Yukon river.

Q. But they were to take passengers on another boat having in tow the "Eugene"? A. Some other boat.

Q. It was contemplated when the contract was made.

A. Yes.

Q. The very purpose of making the contract was to bring the "Eugene" up in that manner and carry passengers on another boat, and transfer them at St. Michaels, was it not?

A. Well, I suppose that was the intention.

Q. And in so far as the McGuires did that there was no breach of the contract between them and the owners?

A. Not that I know of, only in regard to their representing that the "Eugene" would surely get through; that they never done, I don't think, because as far as I know I heard passengers ask myself, and they told them that they could not guarantee to get them through.

Q. That was at Portland? A. Yes, sir.

Q. You were never at Seattle during that time?

A. I was not at Seattle; I don't know what they done here.

Q. You do not know what representations were made to the passengers here? A. No, sir.

Redirect Examination.

Q. (By Mr. FLANDERS.) Captain, did you not at the time that contract was entered into know how the "Eugene" was to be taken up to St. Michaels, whether by towboat or by passenger steamer or not, or freight steamer?

A. Well, in the first place, they said they would tow her with a tug.

Q. Was that when the contract was signed or not?

A. Yes, that was when the contract was signed, and of course afterwards I found out they calculated they would tow her with any kind of a steamer they could get.

(Testimony of witness closed.)

It is admitted that there was filed in the office of the collector of customs of Portland, Oregon, in the District of Willamette, on August 21, 1897, duplicate contract dated August 7th, 1897, between the Willamette and Co-

lumbia River Towing Company and Joel P. Geer, of the first part, and the Alaska Trading and Transportation Company, being Claimant's Exhibit 3 in this case.

District of Washington, }
County of King. } ss.

I hereby certify that the foregoing record, from page 1 to page 253, both inclusive, contains all testimony offered by libelant and claimant in the foregoing entitled cause; that said testimony was taken at the time and place therein mentioned; that each of said witnesses were duly sworn by mebefore testifying; that by agreement of proctors I reducedt he testimony of said witnesses to writing in shorthand, and proctors for the libelants and claimant stipulated and agreed that the testimony of said witnesses as transcribed by me should be taken as the testimony of said witnesses, the same as if duly signed by them; and I certify that the testimony of said witnesses as transcribed is the testimony given by said witnesses. I return herewith the several exhibits introduced by libelant (from "A" to "AE") and claimant ("1" to "5").

Witness my hand and official seal this 27th day of November, 1897.

[Seal] A. C. BOWMAN,
U. S. Commissioner.

In the District Court of the United States for the District of Washington, Northern Division.

THE STEAMBOAT "EUGENE."
GASTON JACOBI and CHAS. RUFF,
Libelants.

JOEL G. GEER,
Claimant.

Deposition of C. H. Lewis.

It is hereby stipulated that the depositions of George Good, E. B. McFarland, and C. H. Lewis for claimant may be taken at Portland, Oregon, before clerk U. S. District Court or any U. S. Commissioner, upon the interrogatories, direct and cross, hereto attached, without the issuance of a commission or any formalities other than the administration of an oath, such testimony to be received at the trial of this cause, subject to any objections as may there be made as to relevancy, competency, or materiality. Said witness Lewis may sign the stenographic notes of the reporter. Said testimony shall be returned by the time set for trial, and such trial shall not be postponed by reason of its nonreceipt. Proctors for neither party shall be present when such testimony is taken, and said officer shall certify to the fact of such

absence, otherwise such depositions shall not be received in evidence.

STRUDWICK & PETERS, and
WILLIAMS, WOOD & LINTHICUM,
Proctors for Claimant.
JOHN C. HOGAN,
PATTERSON & EARLY,
Proctors for Libelants.

Interrogatories to be propounded to C. H. Lewis, witness on behalf of claimant.

1. What is your name and present occupation?

2. What experience, if any, have you had as a navigator upon the waters between the Columbia river and Yukon river.

3. Do you know the "Eugene"? If so, for how long?

4. Were you on the "Eugene" at the time of the transaction in controversy? If so, state when you joined her and in what capacity and how long you remained in that capacity on her.

5. If you were on the "Eugene" between the Columbia river and Straits of Fuca testified to by Capt. Geer, describe the weather and how the boat acted.

6. Describe the weather from the time the "Bristol" overtook the "Eugene" north of Comox until she turned back into Alert Bay, and particularly describe the weather, wind, and sea the day on which she put back.

7. How did the "Eugene" behave during said trip, and how during the last day.

8. Describe the circumstances under which you turned back.

9. When did you first see the libelants Ruff and Jacobi? Did you have any dealings with them? If so, state what they were.

11. Did you examine the "Eugene" after she had put in Alert Bay? If so, state her condition, and to what causes do you attribute the same.

12. State the circumstances under which the passengers on the "Bristol" returned to Victoria.

13. If you know anything more about the matters in controversy state, the same in full.

WILLIAMS, WOOD & LINTHICUM,
STRUDWICK & PETERS,
Proctors for Claimant.

Cross-interrogatories to be propounded to C. H. Lewis.

Cross-Int. 1. Captain, a paper in the form of a letter signed by you hs been introduced in evidence, and is now copied in this interrogatory, and is as follows:

"Alert Bay, Sept. 6, 1897.

Capt. McIntyre.

Dear Sir: Yours received, and contents noted. I must say that the steamer 'Eugene' is not in a fit condition to proceed with the steamer 'Bristol' on her voyage north. We will have to remain here until towed out or convoyed by some steamer.

To Capt. Jas. McIntyre, Master S. S. 'Bristol.'

Yours respectfully,
C. H. LEWIS,
Master of Str. 'Eugene.'"

You remember the circumstances of the giving of that letter to Capt. McIntyre, do you?

Int. 2. And you sent this letter at the time it is dated, did you?

Int. 3. That letter was sent Capt. McIntyre with your knowledge and consent, was it?

Int. 4. And you recollect of signing a letter similar to the one of which the above is a copy?

JOHN C. HOGAN, and
PATTERSON & EARLY,
Proctors for Libelants.

In the District Court of the United States for the District of Washington, Northern Division.

THE STEAMBOAT EUGENE.
GASTON JACOBI and CHAS. RUFF,
Libelants,
JOEL P. GEER,
Claimant.

Pursuant to the annexed stipulation, appointing me, E. D. McKee,, clerk of the District Court of the United States for the District of Oregon, a commissioner to take the depositions of C. H. Lewis, E. B. McFarland, and George Good, witnesses on behalf of the claimant in the above-entitled cause, in answer to the interrogatories and cross-interrogatories thereto annexed, I proceeded to take the depositions of said witnesses at my office in the city

of Portland, Oregon; said witness C. H. Lewis appearing before me and testifying on Monday, November 22, 1897; and said witnesses E. B. McFarland and George Good appearing before me and testifying on Tuesday, November 23, 1897; and said witnesses, having been by me first duly cautioned and sworn to speak the truth, the whole truth, and nothing but the truth, testified as follows:

C. H. LEWIS, a witness on behalf of the claimant, being first duly sworn, testified as follows.

Direct Interrogatories.

1. What is your name and present occupation?

A. C. H. Lewis, chief officer of the steamship "Oregon."

2. What experience, if any, have you had as a navigator upon the waters between the Columbia and Yukon river?

A. My experience between the Columbia river and the Yukon river—I have had experience on the waters of the Columbia river to the Alaskan waters, an experience of five years as mate and master. And I have been several trips to the Yukon river on sailing vessels.

3. Do you know the "Eugene"? If so, for how long?

A. I know the "Eugene" by seeing her on the river, as a river boat here, and my experience on her going from here to Puget Sound, and from Puget Sound to Alert Bay. I have known her for about three months.

4. Were you on the "Eugene" at the time of the transaction in controversy? If so, state when you joined her

and in what capacity, and how long you remained in that capacity on her.

A. Yes, sir. I joined the "Eugene" on the 20th of August, 1897. Went from here to Puget Sound on her. I joined her as master of her—captain; remained on her as captain up to the 11th of September, or 12th; I am not certain of dates I think it was the 11th.

5. If you were on the "Eugene" between the Columbia river and Straits of Fuca testified to by Captain Geer, describe the weather, and how the boat acted.

A. The weather we had from the Columbia river to Puget sound was common, ordinary weather, strong northwest wind, which we generally have at that time of the year; and the boat acted in that weather very well for a river boat. We went through all right.

6. Describe the weather from the time the "Bristol" overtook the "Eugene" north of Comox until she turned back into Alert Bay, and particularly describe the weather, wind, and sea the day on which she put back.

A. The morning of the day the "Bristol" picked us up, at the northwest end of Vancouver's Island, abreast of Fort Rupert, the weather was fine, but looking threatening and glass falling. It kept fine till eleven o'clock A. M., when it commenced to increase from the southeast, and by two P. M. was blowing a strong gale—was short, choppy sea running. That was the morning he picked us up. At noon on the same day, when we turned back, it was blowing a strong gale from the southeast, and the ship was showing signs of breaking up, and the crew protested to going further, and desired to be turn-

ed back with the ship. I hailed the steamship "Bristol," and signalized her to turn back to a port of safety, for the ship was breaking up. He turned back at two P. M. and proceeded for Alert Bay. It blew a strong gale all night, and the ship received damage during the gale, which made her unseaworthy and not fit to proceed any further north. We arrived in Alert Bay on the following morning, I forget the exact morningor exact date. But when we arrived there, there was a survey held on the ship, on the steamer "Eugene," by four men—two sea captains and two ship's carpenters. They pronounced the ship damaged and unseaworthy, and not fit to proceed further north.

7. How did the "Eugene" behave during said trip, and how during the last day?

A. The "Eugene" behaved very well for a river boat at sea. On the trip after we turned back to Alert Bay, when we held a survey on her, and these people surveyed her and pronounced her unseaworthy, she behaved as well as any river boat could in such a gale of wind. She was out of her element. She got in a gale of wind at sea, and behaved as well as any boat of her class could.

8. Describe the circumstances under which you turned back.

A. We found the ship was breaking up, and turned back in order to save her and the life of the people on board.

9. When did you first see the libelants Ruff and Jacobi?

A. I don't know either one of the gentlemen. I nev-

er met them, to my knowledge, any more than any other passengers on the ship.

10. Did you have any dealings with them? If so, state what they were.

A. I never had any dealings with them of any kind; would not know them if I saw them.

11. Did you examine the "Eugene" after she had put into Alert Bay? Is so, state her condition, and to what causes do you attribute the same.

A. Well, we held a survey on the steamer after we arrived in Alert Bay, by four men—two sea captains and two ship's carpenters; found several of her timbers broken on the port and starboard side, and several broken on the bow; found the oakum out of her seams; and she was making water freely. After they held a survey on her, they pronounced her unseaworthy and not fit to proceed any further north. I attribute the same to the rough usage she received at sea, in tow of the "Bristol"—the force of the wind and sea.

12. State the circumstances unler which the passengers on the "Bristol" returned to Victoria.

A. Well, as far as I know the circumstances of their return to Victoria was that the "Eugene" was not able to proceed further north, and they had to turn back. They were all satisfied, to a man, to turn back.

13. If you know anything more about the matters in controversy, state the same in full.

A. Well, I don't know any more about it, only that I have a log of the ship from the time we left Portland, Oregon, till we arrived in Puget sound; from thence to

Comox, from Comox to Alert Bay, to sea and return—describing the full particulars of the trip. If you wish to have the log—it is a copy of the log I kept on the ship—if you wish to have that copy for reference, you can have it.

Cross-Interrogatories.

1. Captain, a paper in the form of a letter signed by you has been introduced in evidence, and it now copied in this interrogatory, and is as follows:

"Alert Bay, Sep. 6, 1897.

Capt. McIntire.

Dear Sir: Yours received, and contents noted. I must say that the steamer 'Eugene' is not in a fit condition to proceed with the steamer 'Bristol' on her voyage north. We will have to remain here until towed out or convoyed by some steamer.

To Capt. Jas. McIntyre.

Yours respectfully,

C. H. LEWIS,

Master of Str. Eugene."

You remember the circumstance of the giving of that letter to Capt. McIntyre, do you? A. I do.

2. And you sent this letter at the time it is dated, did you? A. Yes.

3. That letter was sent Capt. McIntyre with your knowledge and consent, was it?

A. Yes. It was sent to him in answer to a note I received from him. He sent me a note telling me that his

ship was going to proceed to sea at ten o'clock the following morning, and wanted to know if I was ready to proceed on the voyage with it; and I wrote him that note telling him that I wsa not, and stating the condition of the ship.

4. And you recollect of signing a letter similar to the one of which the above is a copy? A. Yes.

United States of America, }
District of Oregon. } ss.

I, E. D. McKee,clerk of the United States District Court for the District of Oregon, hereby certify that unde and in pursuance of the stipulation hereto annexed, the witness C. H. Lewis, on behalf of claimant, appeared before me on November 22, 1897, and the witnesses E. B. McFarland and George Good appeared before me on November 23, 1897, and were examined upon the written interrogatories and cross-interrogatories attached to such stipulation; said witnesses being examined in the presence of myself and the reporter alone, proctors for neither party or other persons being present. And said witnesses severally made the answers to said several interrogatories and cross-interrogatories hereinbefore set forth. Said answers were taken down in shorthand, and thereafter extended by the reporter; and said testimony when extended, was read over and signed by the witnesses E. B. McFarland and George Good, their several signatures appearing at the close of said respective depositions; the signature of said C. H. Lewis to his own

deposition after extension being waived by the respective parties, according to said deposition.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Portland, Oregon, this 24th day of November, 1897.

[Seal U. S. District Court] E. D. McKEE,
Clerk United States District Court for the District of Oregon.

[Endorsed]: Depositions of C. H. Lewis, E. B. McFarland, and Geo. Good. Published and filed Nov. 29, 1897. In the United States District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

November 30, 1887.

General Order Book, D. C., vol. 3, page 433.

GASTON JACOBI,
vs. } 1128.
STMR. "EUGENE," etc.

Minute Order.

Now, on this day, this cause coming on for final hearing, the Court, after hearing argument of respective counsel, takes said matter under advisement.

In the District Court of the United States, for the District of Washington, Northern Division.

GASTON JACOB I and CHARLES RUFF,
Libelants,
vs.
THE STEAMSHIP "EUGENE,
Respondent.

Order of Default.

The marshal having returned, on the monition issued in the above-entitled action, that he had attached the said vessel, her tackle, apparel, and furniture, and had given due notice to all persons claiming the same that the said court would on the 7th day of Oct., 1897, proceed to trial and condemnation of said vessel, her tackle and furniture, and the time within which appearance might be made or claims interposed herein having long since expired, and no persons apearing herein, except Joel P. Geer, claimant, and the intervenors, Fred M. Lyons, Walter M. Cary, and Edward J. Knight, and C. Hennigar, therefore on motion of libelant's proctor, it is ordered that the defaults of all persons be and the same is hereby en-

tered with the exception only of the above named claimant and intervenors.

Dated this 7th day of Dec., 1897.

C. H. HANFORD,
Judge.

Recd. copy hereof this Dec. 6, 1897.

STRUDWICK & PETERS,
Attys. for Claimant Joel P. Geer.

[Endorsed]: Order of Default. Filed Dec. 7, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy

---

In the District Court of the United States for the District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,
Libelants,
vs.
THE STEAMSHIP "EUGENE,
Respondent.
JOEL P. GEER,
Claimant,
And FRED N. LYONS, WALTER M. CARY, and EDWARD J. KNIGHT,
Intervenors.

Final Decree.

The monition and attachment issued in the above-entitled cause having been heretofore duly returned, and the

default of all persons except the above-named claimant and intervenors having been duly entered herein, and this cause coming on regularly to be heard upon the pleadings and proofs of the respective parties herein, and argued by the proctors of the respective parties, and after due deliberation being had in the premises, the Court finds that all of the material allegations of the libel are true, and that the libelants are entitled to recover herein, and the Court having assessed the amount of said libelants' recovery at the sum of eight hundred dollars ($800.00) for each of the libelants, and it appearing to the Court that the said steamer "Eugene" is liable in specie for the payment of said amount to each of the libelants, therefore, on motion of proctor for libelants,

It is hereby ordered, sentenced, and decreed that the said steamship "Eugene," her tackle, apparel, and furniture, be, and the same hereby are, condemned for the payment of the aforesaid amounts, to-wit, for the payment of the sum of eight hundred dollars to the libelant Gaston Jacobi, and for the further sum of eight hundred dollars to the libelant Charles Ruff, together with the costs and disbursements of this action, taxed at the sum of ——— dollars.

And a stipulation having been duly entered into and filed in this cause by the respective parties, wherein it is stipulated and agreed that the intervenors Fred M. Lyons, Walter M. Cary, and Edward J. Knight shall abide the result of the trial of the issues between libelants and claimant herein, and shall be entitled to the same recov-

ery upon their intervening libels herein as might be recovered by the principal libelants Jacobi and Ruff, therefore, in accordance with said stipulation, and on motion of the proctor of said intervening libelants,

It is ordered, sentenced, and decreed that the said intervenor Fred M. Lyons do have and recover herein the sum of eight hundred dollars ($800.00), and that the said intervenor Walter M. Cary do have and recover herein a like sum of eight hundred dollars, and that the intervenor Edward J. Knight do have and recover herein a like sum of eight hundred dollars ($800.00), together with their costs and disbursements herein, taxed at the sum of——— dollars, and that the said steamship "Eugene," her tackle, apparel, and furniture, be, and the same hereby are, condemned to the payment of the said sums.

And it is further ordered that the claim of the intervening libelant C. Hennigar be reserved for such judgment or orders as the Court deems just, upon such further hearing as may be had upon the issues therein.

And it is further ordered, adjudged, and decreed that the said steamship "Eugene," her tackle, apparel, and furniture, be, by the marshal of this district, exposed for sale and sold at public vendue, to the highest and best bidder for cash, after due notice as provided by law and the rules and practice of this court, and that the said marshal pay the proceeds arising from such sale, after deducting the costs and expenses thereof, into the registry of this court, there to await the further order of the Court in the premises as to the distribution of the same.

And to that end it is ordered and decreed that the clerk of this court issue a decree of venditioni exponas to the said marshal, returnable as required by the rules and practice of this court, and that the said mrashal execute the same and make return thereof with all convenient speed.

Dated Dec. 7th, 1897.

(Claimant Joel P. Geer excepts, and his exception is alowed.)

C. H. HANFORD, Judge.

Service of a copy hereof received this Dec. 6, 1897.

STRUDWICK & PETERS,

Attys. for Joel P. Geer, Claimant.

[Endorsed]: Judgment and Decree. Filed Dec. 7, 1897. In the United States District Court. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

IN ADMIRALTY.

THE STEAMBOAT "EUGENE," Her Tackle, Apparel, and Furniture,
GASTON JACOBI and CHARLES RUFF,
Libelants and Respondents.
JOEL P. GEER,
Claimant and Appellant.
FRED M. LYONS, WALTER M. CARY, and EDWARD J. KNIGHT, Named in said Final Decree as Intervenors.

Petition for Appeal, and Assignment of Errors.

Joel P. Geer, claimant herein, hereby appeals (and files his assignment of errors) from the decree entered in the above-entitled court in the above-entitled cause on December 7th, 1897, and from the whole thereof, to the next regular term of the United States Circuit Court of Appeals for the Ninth Circuit; and respectfully shows to the Court and alleges as follows:

That on the 18th day of September, 1897, or thereabouts, the libelants Gaston Jacobi and Charles Ruff filed their joint and several libel in the above-entitled

court in the above-entitled cause, wherein they alleged substantially as follows:

That the steamboat "Eugene" was, at the time of the filing of said libel, lying in port in the city of Seattle, Washington, bound on a voyage, via the port of St. Michaels, Territory of Alaska, to Dawson City, Northwest Territory, Dominion of Canada; and that at the times mentioned in said libel the steamship "Eugene" was owned and operated by the Portland and Alaska Trading and Transportation Company, a corporation organized under the laws of the State of Oregon, and that during said time said company was the owner of and engaged in running and operating a certain other steamship named the "Bristol," plying between Seattle, Washington, and St. Michaels, Alaska; that during all of said times one E. B. McFarland was the general manager, and one F. C. Davidge & Co. was the agent of said steamship "Eugene" and "Bristol," and of said Portland and Alaska Trading and Transportation Company, and as such were authorized and empowered, on behalf of said steamship "Eugene" and of said company, to enter into any and all contracts for the transportation or conveyance of passengers, baggage, or freight from Seattle, Washington, to Dawson City, via said port of St. Michaels; and that on or about the 19th day of August, 1897, by and through said E. B. McFarland and said F. C. Davidge & Co., the libelant Gaston Jacobi engaged passage for himself, to be conveyed with three-fourths of a ton of baggage from Seattle, Washington, to Dawson City, and purchased of said manager and agents

aforesaid two tickets for said passage, one of said tickets being for the conveyance of himself and baggage by said steamship "Bristol" from Seattle, Washington, to said port of St. Michaels, Alaska, and the other of said tickets being for the conveyance of himself and baggage from said port of St. Michaels, Alaska, to said Dawson City Northwest Territory, of the last named of which said tickets the following was a copy:

"No. 6. Portland and Alaska Trading and Transportation Company.

Good for one passage from St. Michaels, Alaska, to Dawson City, N. W. T., via S. S. 'Eugene.' Name, Gaston Jacobi.

(Signed) E. B. McFARLAND, General Manager."

For which said libelant paid for the first of said tickets—from Seattle to St. Michaels—the sum of one hundred dollars, and for said second named ticket from St. Michaels to Dawson City the sum of two hundred dollars, and that libelant expended in the purchase of baggage, consisting of a miner's outfit, the sum of $200.00, and that at the time of the purchase of said tickets, the said steamship "Eugene" and said respondent company caused it to be advertised publicly, and undertook and agreed with libelant that said steamship "Eugene" would sail from the port of St. Michaels for said Dawson City, on the 24th day of August, 1897, or thereabouts, and would carry libelant over said route; and that said steamship "Eugene" wholly failed and neglected to keep said contract, although libelant was at all times ready

and willing to comply with said contract, and did comply therewith, and that by reason of the failure of said steamship "Eugene" to comply with said agreement libelant lost the amount paid by him for said tickets and said outfit, and was subjected to further delay to his damage in the sum of $1,000.00.

And the claim of the said libelant Charles Ruff was substantially as the one just aforesaid, save that it alleged that the purchase of the ticket was on August 10th, 1897.

To said libel claimant Joel P. Geer excepted, in so far as the same sought to establish a lien upon said steamship "Eugene," which said exceptions were allowed by the Court, with leave granted libelants to amend; and on the 22d day of October, 1897, or thereabouts, said libelants filed an amended libel, which substantially alleges as follows:

That the "Eugene" was in the waters of Puget sound at the time of the filing of said amended libel, and at all times therein mentioned was owned and operated by the Portland and Alaska Trading and Transportation Company, which was engaged in the carriage of passengers, baggage, and freight between Seattle, Washington, and Dawson City, N. W. T.; and during said times one E. B. McFarland was the general manager and one C. W. Gould was the agent of said steamship "Eugene," and said company duly authorized and empowered to enter into any and all contracts on behalf of said steamship "Eugene" and of said company for the transportation of passengers, baggage, and freight from Seattle, Washing-

ton, to Dawson City, N. W. T., and that during all of said times said Portland and Alaska Trading and Transportation Company operated a certain other steamship known as the "Bristol" in connection with its said business as a common carrier between the points aforesaid; and that on or about the 11th day of August, 1897, the said steamship "Eugene," through her owners, manager, and agent, caused it to be publicly and extensively advertised that the said steamship "Eugene," in tow of the said steamship "Bristol," would leave Seattle, Washington, on or about the 23d day of August, 1897, for Dawson City, N. W. T., and would transport and carry passengers, baggage, and freight, up to a certain number and limit, and would reach said Dawson City not later than September 15th, 1897, and that relying on the faith of said advertisement, and believing the representations therein to be true, said libelant Gaston Jacobi, on or about the 19th day of August, 1897, entered into a contract with said steamship "Eugene," wherein and whereby the said steamship "Eugene" undertook, promised, and agreed to carry said libelant from said city of Seattle, Washington, to Dawson City, N. W. T., via St. Michaels, Alaska, and would leave Seattle, Washington, on said voyage on the 24th day of August, 1897, and would reach Dawson City not later than September 15th, 1897; and that it was agreed that said "Eugene" would leave Seattle on said voyage in tow of said steamship "Bristol," and would be towed by said steamship "Bristol" from Seattle to said port of St. Michaels, from which place said steamship "Eugene" would proceed on said voyage alone up the

Yukon river to said Dawson City, and would reach there on September 15th, and that in consideration of said promise and agrtements libelant engaged passage on said steamship from Seattle, Washington, to said Dawson City, and paid therefor the passage money, amounting to the sum of $300.00, for the conveyance of himself and 1,500 pounds of baggage, and received tickets for said passage; that libelant performed all the terms and conditions of said contract, and that on or about the 24th day of August, 1897, said steamship "Eugene" entered upon the performance of said contract, and left said city of Seattle in tow of said steamship "Bristol," and undertook to carry libelant and other passengers over the whole of said voyage, and proceeded on the high seas for a distance of upwards of six hundred or seven hundred miles, up to the coast of Alaska, when said steamship "Eugene" abandoned said voyage and refused to proceed further thereon, and libelant was landed at the city of Victoria B. C., and that said steamship "Eugene" wholly failed and neglected to keep said contract on her part, and that libelant, on the faith of said representations and agreements, purchased an outfit at an expense of $200.00, which was rendered valueless, and that he lost a large amount of time, all to his damage in the sum of $1,000.-00; and the claim of said libelant Charles Ruff was to the same effect, and he claimed the same damages.

That thereafter, and on the   day of November, 1897, Joel P. Geer, claimant of said steamship "Eugene," filed an answer to said amended libel, and substantially alleged as follows:

He denied that said steamship "Eugene" at the times mentioned in said libel was owned by said Portland and Alaska Trading and Transportation Company, or that it was operated by said company in any manner save as set up in said answer; he denied that any or all of the persons named in said libel were authorized to enter into any contract, on behalf of said steamship "Eugene" or of said company, for the transportation of passengers, baggage, or freight from said city of Seattle, Washington, to said Dawson City, N. W. T.; and denied that any advertisements were made by said "Eugene," its manager or agents, to the effect that said steamship "Eugene," in tow of steamship "Bristol," would leave Seattle Washington, for Dawson City, N. W. T., on 23d day of August, 1897, as alleged in said amended libel; and denied that on or about the 19th day of August 1897, or at any time, the libelant Gaston Jacobi made or entered in to a contract with said steamship "Eugene," wherein or whereby said steamship "Eugene" promised, undertook, or agreed to carry libelant from said city of Seattle, Washington, to said Dawson City, N. W. T., via the port of St. Michaels, or that it was agreed that said vessel would leave Seattle, Washington, on the 24th day of August, 1897, or at any other date or time, or that she would reach said Dawson City not later than September 15th, 1897; or that said steamship "Eugene" would leave said city of Seattle, Washington, in tow of said steamship "Bristol," or would be towed by the said "Bristol" from Seattle to said port of St. Michaels, Alaska, or that she agreed to continue said voy-

age up the Yukon river to Dawson City, or that she would reach there on September 15th, as aforesaid, or that in consideration of said alleged promises or any promises libelant engaged passage on said steamship "Eugene" from Seattle, Washington, to said Dawson City, or paid therefor passage money amounting to $300.-00, or any sum whatever, for the conveyance of himself his baggage, or freight, or that he received tickets therefor, or that he ever engaged passage on said steamship "Eugene" from Seattle, Washington, to Dawson City, N. W. T., at all; and claimant in said answer further denied there was any contract whatever as in said libel alleged, or that on or about August 24, 1897, or at any other time, said "Eugene" entered upon the performance of said alleged contract, or that she left Seattle in tow of said steamship "Bristol," or that she undertook to carry libelant or other passengers over the whole of said voyage, or any part thereof, or proceeded upon said alleged voyage for the distance of upwards of six hundred or seven hundred miles, or any distance, up to the coast of Alaska, or that she abandoned said voyage or refused to proceed further thereon, or that any such alleged contract existed between said steamship "Eugene" and libelant, or that she failed or neglected to keep the same.

And claimant further denied that on the faith of said alleged representations or agreements libelant underwent any expense in the procuring of an outfit, or that he was entitled to recover for any alleged expenses or for any loss of time, by reason of said alleged breach, for the

reason that the same were too remote and speculative, and furnish no basis for a recovery.

And further answering the libel of said Gaston Jacobi claimant alleged:

That prior to the 31st day of July, 1897, Francis B. Jones and Joel P. Geer, being part owners of the steamship "Eugene," then belonging to the port of Portland, State and District of Oregon, entered into a contract and agreement with the Portlanl and Alaska Trading and Transportation Company, in words as follows, to-wit:

This agreement, made this 31st day of July, 1897, by and between Francis B. Jones and Joel P. Geer, of the city of Portland, Multnomah Co., Oregon, and the Portland and Alaska Trading and Transportation Company of the same place, witnesseth:

That whereas, the said Francis B. Jones and Joel P. Geer are desirous of placing the steamer "Eugene," now plying as a passenger boat upon the Willamette river, upon the Yukon river, in the territory of Alaska and the Northwest Territory of Great Britain, adjoining thereto, for the purpose of running the said boat upon the said river;

And whereas, the Portland and Alaska Trading and Transportation Company are desirous of using the said boat for the purpose of transporting freight up the Yukon river to Circle City or Dawson;

Now, therefore, in consideration of the premises, and the further consideration of one dollar in hand paid the said Francis B. Jones and Joel P. Geer, have, and do hereby agree to and with the said Portland and Alaska Trad-

ing and Transportation Company to turn over the possession of the said steamer "Eugene" to the said Portland and Alaska Trading and Transportation Company for the purposes aforesaid, of taking the same to and up the Yukon river to such point of the same as the said Portland and Alaska Trading and Transportation Company may desire, and when the said steamer "Eugene" has arrived at the terminal point decided upon by the Portland and Alaska Trading and Transportation Co-, upon the river Yukon and hath discharged hercargo within a reasonable time and under existing conditions, the said Portland and Alaska Trading and Transportation Company shall turn over the said steamer to the Willamette and Columbia River Towing Company and Joel P. Geer, and to there enter a joint traffic interchange between Portland, Oregon, and Dawson City, Alaska, for ensuing year, on a basis of 40 per cent to the steamer "Eugene" and 60 per cent to the Portland and Alaska Trading and Transportation Company of through rates, details of which to be entered into before sailing from Portland, without charge, cost, or expense to them. But it is expressly understood that the said Portland and Alaska Trading and Transportation Company do not hereby agree to transfer said steamer safely to the said Yukon, but only to make the endeavor so to do, using all proper precaution and care in said effort. But if the said steamer "Eugene" shall fail to reach the Yukon river or said point of destination by reason of any infirmity in the character of the steamer, but without negligence upon the part of the agents of the said Portland and

Alaska Trading and Transportation Company, the latter shall not be responsible in any way for the loss of the said steamer or its failure to arrive at the proposed terminal destination.

And the said Portland and Alaska Trading and Transportation Company in consideration of the premises, and that the said Francis B. Jones and Joel P. Geer have put the said steamer "Eugene" into their possession for the aforesaid purposes, hath and do hereby agree to put the said boat at their own proper cost, charge, and expense into such condition as will render it, as far as practicable, seaworthy and safe to proceed upon the high seas to the said Yukon river. The said repairs and renewals necessary to be made to and upon the said steamer "Eugene" to be done at once, and to be satisfactory to the said Francis B. Jones and Joel P. Geer before the said steamer leaves thec ity of Portland.

In testimony whereof, the said Francis B. Jones and Joel P. Geer, and the Portland and Alaska Trading and Transportation Company, by its president, have hereunto set their hands and seals, and the seal of the said company.

F. B. JONES.
JOEL P. GEER.

H. P. McGUIRE, For the Portland and Alaska Trading and Transportation Co.

That thereafter, and on the 7th day of August, 1897, the Willamette and Columbia River Towing Company and said Joel P. Geer, the then owner of said steamship

"Eugene," then lying in the port of Portland, Oregon, and Portland and Alaska Trading and Transportation Company, entered into a contract relative to said steamship "Eugene," in words as follows, to-wit:

This agreement, made this 7th day of August, 1897, by and between Willamette and Columbia River Towing Company, a corporation, and Joel P. Geer, of the city of Portland, Oregon, and the Portland and Alaska Trading and Transportation Companyof the same place, witnesseth:

That whereas, the said Willamette and Columbia River Towing Company and Joel P. Geer are desirous of placing the steamer "Eugene," now plying as a passenger boat upon the Willamette river, upon the Yukon river, in the Territory of Alaska, and the Northwest Territory of Great Britain, adjoining there to, for the purpose of running the said boat upon the said river;

And whereas, the Portland and Alaska Trading and Transportation Company are desirous of using the said boat for the purpose of transporting freight up the Yukon river to Circle City or Dawson City, Northwest Territory:

Now, therefore, in consideration of the premises, and of the repairs, improvements, and money expended by the Portland and Alaska Trading and Transportation Company upon said steamer "Eugene" in preparing the said steamer fo rthe sea voyage from Portland to St. Michaels, Alaska, and the further consideration of one dollar in hand paid, the said Willamette and Columbia River Towing Company and Joel P. Geer, have, and do

hereby agree to and with the said Portland and Alaska Trading and Transportation Company to turn over, and do hereby, turn over, the possession of the said steamer "Eugene" to the said Portland and Alaska Trading and Transportation Company for the purposes aforesaid, of taking the same to and up the Yukon river to such point of the same as the said Portland and Alaska Trading and Transportation Company may desire, and when the said steamer "Eugene" has arrived at the terminal point decided upon by the said Portland and Alaska Trading and Transportation Company, upon said river Yukon, and hath discharged her cargo, the said Portland and Alaska Trading and Transportation Company shall turn over to the said Willamette and Columbia River Towing Company and Joel P. Geer, without expense to them so far as transporting said steamer "Eugene" to said Dawson City, Alaska. But it is expressly understood that the said Portland and Alaska Trading and Transportation Company do not hereby agree to transfer said steamer safely to the said Yukon, but only to make the endeavor so to do, using all proper precaution and care in said effort. But if the said steamer "Eugene" shall fail to reach the Yukon river or said point of destination by reason of any infirmity in the character of the steamer, but without negligence upon the part of the agents of the said Portland and Alaska Trading and Transportation Company, the latter shall not be responsible in any way for the loss of the said steamer or its failure to arrive at the proposed terminal destination.

And the said Portland and Alaska Trading and Trans-

portation Company, in consideration of the premises, and that the said Willamette and Columbia River Towing Company and Joel P. Geer have put the said steamer "Eugene" into their possession for the aforesaid purposes, hath and do hereby agree to put the said boat, at their own proper cost, charge, and expense, into such condition as will render it, as far as practicable, seaworthy and safe to proceed upon the high seas to the said Yukon river. In consideration of the money expended by the said Portland and Alaska Trading and Transportation Company in the preparation, repairing, and improvement of the said steamer "Eugene" at the city of Portland, Oregon, so as to make her seaworthy, the Willamette and Columbia River Towing Company and Joel P. Geer hereby enter into an agreement with and hereby bind themselves to give the passengers and freight offered them by the said Portland and Alaska Trading and Transportation Company at St. Michaels, or any other point agreed upon by them at or near the mouth of the said Yukon river, the preference of all other passengers and freight, and hereby enter into a joint traffic agreement for the term of one year from the time said steamer "Eugene" reaches Dawson City, with the Portland and Alaska Trading and Transportation Company, for the interchange of passengers and freight between Portland, Oregon, and Dawson City, Northwest Territory, and other points upon the Yukon river reached by said steamer "Eugene," upon the basis of forty (40) per cent of the gross receipts received from all interchangeable passengers and freight to Willamette and

Columbia River Towing Co. and Joel P. Geer, and sixty (60) per cent of said gross receipts to the Portland and Alaska Trading and Transportation Company. The feeding and revenue derived from the passengers and the expense of providing for them upon said steamer "Eugene" is not to be included herein.

In testimony whereof, the said Willamette and Columbia River Towing Company and Joel P. Geer, and the Portland and Alaska Trading and Transportation Company, by its President, have hereunto set their hands and seals, and the seal of the said company.

WILLAMETTE & COLUMBIA R. T. CO. [Seal]

By F. B. JONES, [Seal]

President.

In the presence of:

Alex Sweek.

E. B. McFarland.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY.

[Seal of Portland and Alaska Trading and Transportation Company.]

By JOEL P. GEER. [Seal]

M. S. JONES, Secretary.

PORTLAND & ALASKA TRADING AND TRANSPORTATION COMPANY.

[Seal of Willamette and Columbia River Towing Co.]

By W. W. McGUIRE, Sec.

That in pursuance of said contracts, and in conformity therewith, said owners of said steamship "Eugene" turned the possession of her over unto the said Portland and Alaska Trading and Transportation Company for the purposes, thereof, and not otherwise, and said Portland

and Alaska Trading and Transportation Company proceeded to refit said steamer "Eugene" in accordance with the provisions of said contracts; and claimant averred that the said "Eugene" was not an ocean going vessel, but a light draught river steamboat, then plying upon the waters of the Willamette River in the State of Oregon, and was well known as such both in the community at Portland and Seattle, and that her use upon the seas or any use as carrier of freight, passengers, or baggage was never contemplated between her owners and the said Portland and Alaska Trading and Transportation Company, and that the delivery of said steamboat "Eugene" by her said owners to said Portland and Alaska Trading and Transportation Company of Portland, Oregon, was in accordance with said contracts, and not otherwise, and for the purpose of fitting up said vessel and bringing the same from Portland, Oregon, to St. Michaels, Alaska, between which said latter point and Dawson City, the owners of the "Eugene" and said Portland and Alaska Trading and Transportation Company desired and agreed to operate said boat. That thereafter and before the departure of said boat from Portland, Oregon, the Yukon Transportation Company, of Portland, Oregon, a corporation organized and existing under the laws of the State of Oregon, by purchases from said Willamette and Columbia River Towing Company and said Joel P. Geer became owner of steamship "Eugene," and is the owner thereof, and claimant was master and bailee thereof on behalf of said owner.

That thereafter said steamboat "Eugene," by her own

power, proceeded from Portland to Astoria in the State of Oregon, and from said latter point was towed by the tugboat "Escort" to Port Angeles, in the State of Washington, and from said last-named point proceeded with her own power to Comox, British Columbia, and at or about said last-named point was taken in tow by the steamship "Bristol," such towage being for the purposes mentioned in the said contract of July 31st, 1897, and of August 7th, 1897, not otherwise; and when said steamboat "Eugene" had proceeded, as aforesaid, a distance of six hundred or seven hundred miles from Comox, British Columbia, heavy weather was encountered, and said steamboat "Eugene" began to strain heavily and spring leaks, and was compelled to, and did, return to Port Townsend in the State of Washington, and thence proceeded to Seattle, Washington, for repairs at which said latter point she was lying at the time of her attachment at the instance of libelants, and claimant alleged that the libelant Gaston Jacobi purchased from F. C. Davidge & Co., at Seattle, Washington, passage upon the steamship "Bristol" from Victoria, B. C., to St. Michaels, Alaska, then operated by F. C. Davidge & Co. under time charter, and thereafter embarked upon said steamship "Bristol," to gether with his freight and baggage, and at the same time purchased from the Portland and Alaska Trading and Transportation Company a ticket from St. Michaels, Alaska, to Dawson City, N. W. T., which this claimant is informed and believes, and therefore so alleges, read as follows:

No. 6. Portland and Alaska Trading and Transportation Co.

Good for one passage from St. Michaels to Dawson City, N. W. T., via S. S. "Eugene." Name Gaston Jacobi.

E. B. McFARLAND, Manager.

And claimant alleged that neither libelant Jacobi nor his baggage or freight were ever on board the steamer "Eugene," and that the voyage of said vessel contemplated under said contract evidenced by said ticket was to begin at St. Michaels, Alaska, and end at Dawson City, N. W. T.; and that neither said libelant nor said steamboat "Eugene" ever arrived at St. Michaels, and that said contract was wholly executory.

And claimant averred that by reason of the fact that the steamboat "Eugene" was not a seagoing vessel, and was commonly and generally known as such, neither said Portland and Alaska Trading and Transportation Company nor the owners of said steamboat "Eugene," nor claimant, ever promised or agreed that said vessel could in fact undergo the trip to St. Michaels, and there place herself in readiness to proceed up the Yukon river, and from St. Michaels to Dawson City and claimant alleges that no absolute representations or warranty that she would arrive at St. Michaels on or before September 15, 1897, or at any other time, were made by said Portland and Alaska Trading and Transportation Company to libelant, but only that an attempt would be made to bring her to said point; and claimant averred

that said attempt was so made, and by stress of weather said boat was unable to proceed to St. Michaels, and was obliged to abandon the attempt and return to Port Townsend.

And claimant further averred that libelant, prior to the institution of this suit, released said steamer "Bristol" and said F. C. Davidge & Co. from his contract with them and said steamship for the conveyance of himself from Victoria to St. Michaels, and that the conveyance of libelant contemplated under said ticket on the steamboat "Eugene" was from St. Michaels, Alaska, to Dawson City, and not otherwise; and that neither the said libelant nor said steamer "Eugene" ever arrived at the port of St. Michaels, at which said point said voyage was to commence; and claimant further averred that no part of the passage money alleged as paid was ever paid to or received by the Yukon Transportation Company of Portland, Oregon, owner of the "Eugene," or this claimant as her manager.

And the answer and separate defense of claimant to the claim of said libelant Charles Ruff was in substance the same as the portion of said answer relating to said libel of Gaston Jacobi herein before set forth. To said answer libelants Jacobi and Ruff filed a replication.

Thereafter testimony was taken and proofs were adduced upon the issues this joined, and said cause was argued upon the said amended libel of said Gaston Jacobi and Charles Ruff, and upon the answer of claimant Joel P. Geer thereto, and upon the testimony and proofs adduced the Court, on December 7th, 1897, made and enter-

ed its final decree in said cause, wherein and whereby said Court adjudged and decreed as follows:

In the District Court of the United States for the District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,
Libelants
vs.
THE STEAMSHIP "EUGENE,"
Respondent.
JOEL P. GEER, Claimant, and FRED M. LYONS, WALTER M. CARY, and EDWARD J. KNIGHT,
Intervenors.

Final Decree.

The monition and attachment issued in the above-entitled cause having been heretofore duly returned and the default of all persons, except the above-named claimant and intervenors having been duly entered herein and this cause coming regularly to be heard upon the pleadings and proofs of the respective parties herein, and argued by the proctors of the respective parties, and after due deliberation being had in the premises the Court finds that all of the material allegations of libel are true, that the libelants are entitled to recover herein, and the Court having assessed the amount of said libelants' re-

covery at the sum of eight hundred dollars ($800.00) for each of the libelants, and it appearing to the Court that the said steamer "Eugene" is liable in specie for the payment of said amount to each of the libelants, therefore, on motion of proctor for libelants.

It is hereby ordered, sentenced, and decreed that the said steamship "Eugene," her tackle, apparel, and furniture, be, and the same hereby are, condemned for the payment of the aforesaid amounts to-wit, for the payment of the sum of eight hundred dollars to libelant Gaston Jacobi and for the further sum of eight hundred dollars to the libelant Charles Ruff, together with the costs and disbursements of this action, taxed at the sum of   dollars.

And a stipulation having been duly entered into and filed in this cause by the respective parties, wherein it is stipulated and agreed that the intervenors Fred M. Lyons, Walter M. Cary, and Edward J. Knight shall abide the result of the trial of the issues between libelants and claimant herein, and shall be entitled to the same recovery upon their intervening libels herein as might be recovered by the principal libelants Jacobi and Ruff, therefore, in accordance with said stipulation and on motion of the proctor of said intervening libelants

It is ordered, sentenced, and decreed that the said intervenor Fred M. Lyons do have and recover herein the sum of eight hundred dollars ($800.00), and that the said intervenor Walter M. Cary do have and recover herein a like sum of eight hundred dollars, and that the interve-

nor Edward J. Knight do have and recover herein a like sum of eight hundred dollars ($800.00), together with their costs and disbursements herein taxed at the sum of dollars, and that the said steamship "Eugene," her tackle, apparel, and furniture, be, and the same hereby are, condemned to the payment of the said sums.

And it is further ordered that the claim of the intervening libelant be reserved for such judgment or orders as the Court deems just, upon such further hearing as may be had upon the issues therein.

And it is further ordered, adjudged, and decreed that the said steamship "Eugene," her tackle, apparel, and furniture, be, by the marshal of this district, exposed for sale and sold at public vendue, to the highest and best bidder for cash, after due notice as provided by law and the rules and practice of this court, and that the said marshal pay the proceeds arising from such sale, after deducting the costs and expenses thereof, into the registry of this court, there to await the further order of the Court in the premises as to the distribution of the same.

And to that end it is ordered and decreed that the clerk of this court issue a decree of venditioni exponas to the said marshal, returnable as required by rules and practice of this court, and that said marshal execute the same and make return thereof with all convenient speed.

Dated Dec. 7th, 1897.

(Claimant Joel P. Geer excepts, and his exception is allowed.)

C. H. HANFORD, Judge."

No intervening libel was at the time of the rendition of said final decree or at any time prior thereto, filed by Walter M. Cary, Edward J. Knight, or Fred M. Lyons, named as intervenors in said final decree, nor was any stipulation for costs filed by said persons so named as intervenors.

That on said appeal said claimant and appellant shall seek a new decision on the facts, and shall introduce other and different testimony which was not available at the time of the trial in the District Court, and was not known to appellant and could not with reasonable diligence have been discovered before that time.

That the special facts which appellant shall seek to have reformed, and upon which proofs shall be adduced, are as follows:

That during the times mentioned in said libel and amended libel the "Eugene" was owned by the Portland and Alaska Trading and Transportation Company, and was engaged as a common carrier of passengers, baggage, and freight between Seattle, Washington, and Dawson City N. W. T., and that E. B. McFarland was general manager of said vessel and C. W. Gould, agent of said vessel; that either of said persons was authorized and empowered to enter into any or all contracts on behalf of said vessel, for the transportation of passengers, baggage, or freight from Seattle, Washington, to Dawson City, N. W. T., that said vessel caused it to be advertised that, in tow of the steamship "Bristol," she would leave Seattle for Dawson City on August 23, 1897, and

would carry passengers and baggage, and would reach Dawson City not later than September 15, 1897.

That on the faith of any such representations or advertisements, or on the faith or credit of said vessel, libelants Gaston Jacobi and Charles Ruff, or either of them, or any other person, entered into a contract with the steamship 'Eugene" at any time, wherein and whereby said steamboat "Eugene" undertook promised, or agreed to carry libelants, or any person, from Seattle, Washington, to Dawson City, N. W. T. or that she agreed to leave Seattle, Washington, on said voyage on August 24th, 1897, or at any time, or reach Dawson City on September 15, 1897, or that it was understood and agreed that the "Eugene," in tow of the steamship "Bristol," would leave Seattle, and would be towed from there to the port of St. Michaels, Alaska, or would continue said voyage alone up the Yukon river from said latter port, or that libelants or any other person engaged passage on the steamer "Eugene" from Seattle, Washington, to Dawson City, or paid passage money therefor.

That on August 24, 1897, the "Eugene" entered upon the performance of said contract, and left Seattle in tow of the "Bristol," and undertook to carry libelants or other passengers over the whole of said voyage, and proceeded on the high seas for 600 or 700 miles on said voyage, and there refused to proceed further, and neglected to keep said contract.

That on the faith of said representations and agreements on the part of the "Eugene," libelants went to any

expense, and lost a large amount of time, or that libelants, or either of them, or any other persons, were hindered in carrying on their business or in doing work to their damage in any sum whatever recoverable from said vessel.

The foregoing being in substance the allegations of the amended libel.

The said Court in said decree having failed to make any special findings and finding that all of the material allegations of the libel are true, it will be maintained upon said appeal that the Court erred as follows:

1. In finding that libelants Gaston Jacobi and Charles Ruff, or either of them, are entitled to recover of and from the steamboat "Eugene" any damages whatever by reason of the matters alleged in said libel and amended libel, or upon the proofs adduced in said case.

2. In holding that said libelants, or either of them, had contracted with said steamboat "Eugene" for a continuous voyage from Seattle, Washington, to Dawson City.

3. That the steamboat "Eugene" had entered upon the performance of said alleged voyage.

4. That an action in rem lay against the "Eugene" at the suit of libelants, or either of them, by reason of any of the matters or things disclosed by the pleadings or proofs.

5. In not holding that the "Eugene" was a vessel operated by the Portland and Alaska Trading and Transporation Company (the person with whom and on the credit of whom libelants contracted), under an agree-

ment in the nature of a charter, which authorized and permitted said Portland and Alaska Trading and Transportation Company to use said vessel, or to contract for the carriage of passengers and freight on said vessel, only on the waters of the Yukon river, from St. Michaels to Dawson City, and that the possession of said boat by said Portland and Alaska Trading and Transportation Company was only for such purpose, and that said Portland and Alaska Trading and Transportation Company had no authority or right to pledge said vessel for the performance of any contract in relation to the carriage of passengers, baggage, or freight, except for a voyage up the Yukon river from St. Michaels to Dawson City, in the event of the safe arrival of said vessel at the port of St. Michaels, Alaska.

6. In not holding that any contract on behalf of the "Eugene" was wholly executory.

7. In allowing libelants Jacobi and Ruff each the sum of $800.00 damages; for the reason that the same was excessive and unwarranted, and unjustified by the evidence, in that $400.00 of the amount of said decree in favor of each of said libelants is in the nature of damages for loss of time or expected profits, and as such is too remote, speculative, and contingent, and cannot be recovered from anyone, and that there is no evidence whatever to support the same.

8. In not holding that the steamboat "Eugene" was compelled to put back to Victoria by reason of the perils of the sea and that said vessel under such circumstances,

would in any event be thereby discharged from any obligation or liability to libelants.

9. In not holding that the contract of libelants, and each of them, with said Portland and Alaska Trading and Transportation Company, in so far as the steamboat "Eugene" was concerned, was an executory contract, the performance of which had not been entered upon by the "Eugene."

10. In not holding that the said contract was made by libelants, and each of them, upon the faith of the personal credit and responsibility of said Portland and Alaska Trading and Transportation Company, and its managers and stockholders, and not upon the faith or credit of said steamboat "Eugene."

11. In entering a decree in favor of Fred M. Lyons, Walter M. Cary, and Edward J. Knight, or either or any of them, in the sum of $800.00, or any sum whatever, by reason of each, all, and singular the errors hereinbefore alleged as to the decree in favor of libelants Jacobi and Ruff. And also

12. That the Court was without jurisdiction to entertain the suits of said Fred M. Lyons, Walter M. Cary, and Edward J. Knight, or either of them, or to enter any decree whatever thereon.

13. In decreeing that any stipulation filed in this cause authorizes the rendition of any decree whatever in favor of said alleged intervenors, or any of them, or the recovery of the sum of $800.00, or any other sum, by either or any of said intervenors.

Wherefore, appellant prays that this his appeal and assignment of errors be allowed, and that citation issue according to due process of law.

STRUDWICK & PETERS,

WILLIAMS, WOOD & LINTHICUM,

Proctors for Appellant.

State of Washington, }
County of King. } ss.

W. A. Peters, being first duly sworn, on oath deposes and says that he is a citizen of the State of Washington and above the age of twenty-one years; that on the 17th day of December, 1897, between the hours of nine o'clock in the morning and four o'clock in the afternoon, he served the attached assignment of errors and prayer for appeal on Gaston Jacobi and Charles Ruff, respondents, by leaving a copy of the same at the office of John C. Hogan, their proctor of record, with one J. W. Spriggs, in said office and located therein, for the said John C. Hogan; affiant, after diligent inquiry, being unable to find the said John C. Hogan in person, or either of the respondents Ruff or Jacobi.

Affiant further says that the said J. W. Spriggs was over the age of twenty-one years, and a competent person to accept said service.

W. A. PETERS.

Subscribed and sworn to before me this 17th day of December, 1897.

[Seal] G. F. FAY,

Notary Public in and for the State of Washington, residing at Seattle.

Recd. copy this Dec. 17, 1897.

PATTERSON & EASLY,

Proctors for Libelants.

[Endorsed]: Petition for appeal and assignment of errors. Filed Dec. 17, 1897. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

In the District Court of the United States, for the District of Washington, Northern Division.

THE STEAMBOAT "EUGENE," Her Tackle, Apparel, etc.
GASTON JACOBI and CHARLES RUFF,
Libelants.
JOEL P. GEER,
Claimant.
FRED M. LYONS, WALTER M. CARY, and EDWARD J. KNIGHT, Named in said Decree as Intervenors.

Notice of Appeal.

To Gaston Jacobi and Charles Ruff, libelants, and to John C. Hogan and Patterson and Easly, their proctors, and to Fred M. Lyons, Walter M. Cary, and Edward J. Knight, who are named in the decree hereinafter referred to as intervenors, and to Patterson and Easly, whom claimant is advised and believes represents said alleged intervenors as proctors, and to R. M. Hopkins, clerk of above-entitled court, please take notice:

That Joel P. Geer, claimant of the steamboat "Eugene," hereby appeals from the decree made and entered by the above-entitled court in the above-entitled cause on the 7th day of December, 1897, and from the whole of

said decree, to the next regular term of the United States Circuit Court of Appeals for the Ninth Circuit, and that appellant has regularly and duly filed his appeal herein, which has been allowed in open court.

STRUDWICK & PETERS,
WILLIAMS, WOOD & LINTHICUM,
Proctors for Joel P. Geer, Claimant and Appellant.

Due service of the within notice of appeal by certified copy, as prescribed by law, is hereby admitted, at Seattle, Washington, Dec. 17, 1897.

R. M. HOPKINS,
Clerk U. S. District Court.

Dues service of the within notice of appeal, by certified copy, as prescribed by law, is hereby admitted at Seattle, Washington, Dec. 17th, 1897.

J. C. HOGAN, and
PATTERSON & EASLY,
Proctors for Libelants and Intervenors.

[Endorsed]: Notice of Appeal. Filed Dec. 17, 1897. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

THE STEAMBOAT "EUGENE," Her Tackle, Apparel, etc.
GASTON JACOBI and CHARLES RUFF,
Libelants.
JOEL P. GEER,
Claimant.
FRED M. LYONS, WALTER M. CARY, and EDWARD J. KNIGHT Named in said Decree as Intervenors.

Notice of Appeal.

To Gaston Jacobi and Charles Ruff, libelants, and to John C. Hogan and Patterson and Easly, their proctors, and to Fred M. Lyons, Walter M. Cary, and Edward J. Knight who are named in the decree hereinafter referred to as intervenors, and to Patterson and Easly, whom claimant is advised and believes represents said alleged intervenors as proctors, and to R. M. Hopkins, clerk of above-entitled court, please take notice:

That Joel P. Geer claimant of the steamboat "Eugene," hereby appeals from the decree made and entered by the above-entitled court in the above-entitled cause

on the seventh day of December,1897,and from the whole said decree, to the next regular term of the United States Circuit Court of Appeals for the Ninth Circuit, and that appellant has regularly and duly filed his appeal herein, which has been allowed in open court.

STRUDWICK & PETERS,
WILLIAMS, WOOD & LINTHICUM,
Proctors for Joel P. Geer, Claimant and Appellant.

United States of America, }
District of Washington. } ss.

I, J. C. Flanders, one of the proctors for the claimant and appellant in the above-entitled cause, do hereby certify that I have compared the foregoing copy of notice of appeal with the original thereof; and that the same is a full, true, and correct copy of such original, and of the whole thereof.

J. C. FLANDERS,
Of Proctors for Claimant and Appellant.

[Endorsed]: Notice of Appeal. Filed Dec. 17, 1897. R. M. Hopkins,Clerk. By A. N. Moore, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

THE STEAMBOAT "EUGENE," Her Tackle, Apparel, etc.,
GASTON JACOBI and CHARLES RUFF,
Libelants,
JOEL P. GEER,
Claimant.
FRED M. LYONS, WALTER M. CARY, and EDWARD J. KNIGHT, Named in said Decree as Intervenors.

Order Allowing Appeal.

Now, at this time, comes Joel P. Geer, claimant of the steamboat "Eugene," by Messrs. Strudwick and Peters and Williams, Wood & Linthicum, his proctors, and in open court presents to the Court his petition praying for an order allowing an appeal by him to the United States Circuit Court of Appeals for the 9th Circuit, from the final decree heretofore entered in this cause on December 7th, 1897, and also moves the Court for a stay of proceedings as to the sale of said vessel under said decree, and to fix the amount of the bond to be given by him on such appeal, including the stay of such proceedings.

Whereupon, it is ordered that the prayer of said petition be granted, and that said claimant be, and he is hereby, allowed to take the appeal prayed for therein, upon giving within ten days a supersedeas and cost bond on such appeal, with surety, to be approved by the Judge making this order, in the sum of $2,500, said vessel pending the determination of said appeal to remain in the custody of the marshal of this District.

Dec. 17th, 1897.

C. H. HANFORD.

[Endorsed]: Allowance of appeal. Filed Dec. 17th, 1897. In the United States District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,
Libelants

vs.

THE STEAMSHIP "EUGENE" and Others.

Notice to Give Stipulation.

To the above-named libelants, and to Messrs. John C. Hogan and to the Messrs. Patterson and Easly, their proctors; and to Fred M. Lyons, Walter M. Cary, and Edward J. Knight, who are named in the decree as intervenors, and to Messrs. Patterson and Easly, who claimant is advised and believes represents them as proctors:

You and each of you will please take notice that the appellant and claimant proposes as sureties on his appeal and stay bond Messrs. N. H. Latimer, and R. H. Denny, bankers of the city of Seattle, connected with the Dexter Horton Banking Com-

pany, and that at the courtroom of the above-entitled court, in the city of Seattle, on the 22nd day of December, present appellant will present to the Court for approval, and will give his stipulation on appeal and to supersede the decree herein entered.

WILLIAMS, WOOD & LINTHICUM,
STRUDWICK & PETERS,
Proctors for Appellant.

We hereby accept service of a copy of the within notice this Dec. 18, 1897.

PATTERSON & EASLY, and
JOHN C. HOGAN (By P. & E.),
Proctors for Libelants and Intervenors, Lyons, Cary, and Knight.

[Endorsed]: Notice to give stipulation. Filed Dec. 18, 1897. In the United States District Court. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

In the United States District Court, District of Washington, Northern Division.

GUSTAVE JACOBI and CHARLES RUFF,
Libelants.
vs.
THE STEAMSHIP "EUGENE" et al.
No. 1,128.

Stipulation as to Intervening Libels.

It is hereby agreed that the libel on account of repairs, herein originally filed, shall stand herein, as undetermined and as existing libel herein, and that the present owners of said claim for repairs shall, if they so desire, amend said libel and substitute for the original libelant the present owner of said claim for repairs.

Nov. 30, 1897.

JOHN C. HOGAN, and
PATTERSON & EASLY,
Proctors for Libelants herein.

WILLIAMS, WOOD & LINTHICUM,
For Owners of said Claim.

[Endorsed]: Stipulation. Filed this 20th day of Dec., 1897. R. M. Hopkins, Clerk.

In the United States District Court, District of Washington Northern Division.

GASTON JACOBI, et al., Libelants, vs. STEAMER "EUGENE."	No. 1,128.

Order Approving Bond on Appeal.

This matter coming on now to be heard for approval for supersedeas and appeal bond, upon due notice of libelants and intervenors, they being present by counsel:

Now, upon reading and filing said bond, the same is allowed and approved.

Dec. 23d, 1897.

C. H. HANFORD,
Judge.

In the United States District Court, District of Washington, Northern Division.

THE STEAMBOAT "EUGENE," Her Tackle, Apparel, and Furniture.
GASTON JACOBI and CHARLES RUFF,
Libelants and Respondents.
JOEL P. GEER, Claimant.
Appellant.

Bond on Appeal.

Know All Men by These Presents, that we, Joel P. Geer, as principal, and N. H. Latimer and R. H. Denny, as sureties, are held and firmly bound unto Gaston Jacobi and Charles Ruff, libelants, and to Fred M. Lyons, Walter M. Cary, and Edward J. Knight, who are named in the decree as intervenors, in the sum of twenty-five hundred ($2,500) dollars, and to their and each of their successors, executors, or administrators, to which payment, well and truly to be made, we hereby bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 20th day of December, 1897.

The condition of this undertaking is such that, whereas, said Joel P. Geer has appealed to the United States Cir-

cuit Court of Appeals for the Ninth Circuit from the decree rendered in the above-entitled cause by the District Court of the United States, for the District of Washington, Northern Division, rendered and entered on the 7th day of December, 1897; and whereas, said steamboat "Eugene," her tackle, apparel, and furniture, is in the custody of the marshal of said District under admiralty process, and a writ of venditioni exponas has issued, or is about to issue, under said decree so appealed from, and said appellant is desirous that proceedings under said writ or said decree shall be stayed until the determination of said appeal:

Now, therefore, if said appellant shall prosecute said appeal to said effect, and answer all costs thereof, if he shall fail to make good his plea, and shall make indemnity sufficient to secure the sum recovered for the use and detention of said property, to-wit, said steamboat "Eugene," her tackle, apparel, and furniture, and pay the costs of the suit and just damages for delay and costs and interest on the appeal, then this obligation shall be void; otherwise to remain in full force and virtue.

JOEL P. GEER. [Seal]
N. H. LATIMER. [Seal]
R. H. DENNY. [Seal]

Signed, sealed and delivered in the presence of:

W. A. Peters.

United States of America,
District of Washington,
Northern Division. } ss.

N. H. Latimer and R. H. Denny, being first duly sworn, each for himself deposes and says: That I am one of the sureties on the foregoing bond, and a resident and householder within said district, and am worth in property which is my separate estate, situated therein, the sum of five thousand (5,000) dollars, over and above all my just debts and liabilities, and exclusive of property exempt from execution.

N. H. LATIMER.
R. H. DENNY.

Subscribed and sworn to before me this 22d day of December, 1897.

[Notarial Seal] W. A. PETERS,

Notary Public in and for the State of Washington, Residing at

[Endorsed]: Undertaking on appeal supersedeas. Filed December 23, 1897. In the U. S. District Court. R. M. Hopkins, Clerk.

Citation on Appeal.

(Copy.)

United States of America } ss.
District of Washington. }

To Gaston Jacobi and Charles Ruff, and to Fred M. Lyons, Walter M. Cary, and Edward J. Knight, Greeting:

Whereas, Joel P. Geer, claimant of the steamboat "Eugene," has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree rendered in the District Court of the United States for the District of Washington, Northern Division, in your favor, and has given the security required by law, you are therefore hereby cited and admonished to be and appear before said Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Seattle, in said district, this 23d day of December, 1897.

C. H. HANFORD,
United States District Judge, Washington.

Served on me this 23 day of December, 1897.

JOHN C. HOGAN, and
PATTERSON & EASLY,
Proctors for Libelants and Intervenors.

[Endorsed]: Citation on appeal. Filed Dec. 23, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

United States District Court for the District of Washington.

GASTON JACOBI and Others

vs.

STEAMER "EUGENE," etc.

Præcipe for Transcript on Appeal.

To the Clerk of the above-entitled court:

You will please prepare and certify and send up to the Circuit Court of Appeals the record in the above case on appeal.

WILLIAMS, WOOD & LINTHICUM, and
STRUDWICK & PETERS,

Proctors for Appellant.

[Endorsed]: Praecipe for record on appeal. Filed Dec. 31, 1897. R. M. Hopkins, Clerk. H. M. Walthew, Deputy Clerk.

In the District Court of the United States for the District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF, vs. STEAMER "EUGENE."	No. 1,128.

Order to Transmit Original Exhibits.

Now, upon this 3d day of February, 1898, upon the representations of the clerk of this court that it is impracticable for the said clerk to copy the exhibits in this case, as also the copy of bill of sale of enrolled vessel, filed in this cause by respondent on Nov. 26, 1897, it is ordered by me that all original exhibits filed and introduced in this cause, together with said copy of bill of sale, be by the clerk of this court forwarded to the clerk of the Circuit Court of Appeals, there to be inspected and considered, together with the transcript on appeal in this cause.

C. H. HANFORD, Judge.

[Endorsed]: Order to transmit exhibits, etc. Filed Feb. 3, 1898. In the U. S. District Court. R. M. Hopkins, Clerk By H. M. Walthew, Deputy.

In the District Court of the United States for the District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,
Libelants,

vs.

THE STEAMER "EUGENE," Her Tackle, Apparel and Furniture, and THE PORTLAND AND ALASKA TRADING AND TRANSPORTATION COMPANY,
Respondent,

JOEL P. GEER,
Claimant.

No. 1,128.

Clerk's Certificate to Transcript.

United States of America, }
District of Washington. } ss.

I, R. M. Hopkins, Clerk of the District Court of the United States for the District of Washington, do hereby certify the foregoing four hundred and forty-seven (447) typewritten pages, numbered from one (1) to four hundred and forty-seven (447), inclusive, to be a full, true, and correct transcript of the record on appeal, and all proceedings had in the above and therein entitled suit, and that the same constitutes the transcript of the record upon appeal

from the District Court of the United States for the District of Washington, Northern Division, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, save and excepting the original exhibits and a copy of bill of sale of enrolled vessel, which said exhibits and copy of bill of sale I am directed by the Judge of this court to transmit to the Circuit Court of Appeals, there to be inspected and considered, together with the transcript on appeal in this cause, a copy of which order so directing me will be found on page 447 of this transcript; and that the said transcript contains all that I am required to transmit by General Admiralty Rule 52 of the Supreme Court of the United States, excepting the said bill of sale and exhibits in said cause, in lieu of which I am directed by the Court to certify and transmit to the said Circuit Court of Appeals for the Ninth Judicial Circuit the originals thereof, as per order of Court hereinabove referred to.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of $111.20, and that the same has been paid to me by Williams, Wood & Linthicum, and Strudwick & Peters, proctors for claimant and appellant.

Witness my hand and official seal, at Seattle, Washington, this 3d day of February, 1898.

[Seal] R. M. HOPKINS,

Clerk.

Citation on Appeal (Original).

United States of America }
District of Washington. } ss.

To Gaston Jacobi and Charles Ruff, and to Fred M. Lyons, Walter M. Cary, and Edward J. Knight, Greeting:

Whereas, Joel P. Geer, claimant of the steamboat "Eugene," has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Washington, Northern Division, in your favor, and has given the security required by law, you are therefore hereby cited and admonished to be and appear before said Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Seattle, in said district, this 23d day of December, 1897.

[Seal] C. H. HANFORD,
United States District Judge, Washington.

Served on me this 23d day of December, 1897.

[Seal] JOHN C. HOGAN, and
PATTERSON & EASLY,
Proctors for Libelants and Intervenors.

[Endorsed]: Filed Dec. 23, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

SUPPLEMENTAL TRANSCRIPT OF RECORD.

In the District Court of the United States for the District of Washington, Northern Division.

Supplemental Transcript of Record.

GASTON JACOBI and CHARLES RUFF,

Libelants,

vs.

THE STEAMSHIP "EUGENE," and THE PORTLAND AND ALASKA TRADING AND TRANSPORTATION COMPANY, and All Others Whom it May Concern,

Respondents.

Petition in Intervention of Walter M. Cary, Edward J. Knight, and Fred N. Lyons.

To the Honorable C. H. HANFORD, Judge of the above-entitled court:

Now comes Walter M. Cary, a resident of the State of California, and Edward J. Knight, a resident of the State of Montana, and Fred N. Lyons, a resident of the State of Washington, both citizens of the United States, and re-

spectively petition the Court for leave to intervene in the above-entitled action as co-libelants therein, and that they be permitted to prosecute the above-entitled action as such co-libelants upon such terms as the Court may deem reasonable, and as grounds for such intervention, these petitioners respectfully show to the Court and allege:

I.

That they are entitled to participate in any recovery which may be had herein by the libelants out of the condemnation and sale of the steamship "Eugene," mentioned in the original libel herein, and now in the custody of the Court by virtue of the marshal's attachment thereof, and that they ought to be permitted to share in such recovery to the extent of their respective claims against the said steamship "Eugene," as hereinafter more fully set forth.

II.

They admit each and every allegation set forth in paragraph No. II of libelants' libel herein, and that the said steamship "Eugene," during the time therein and in this petition mentioned, was owned and operated by the said respondent, the Portland and Alaska Trading and Transportation Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon; and was the owner and engaged in operating the steamship "Bristol," mentioned in said libel, plying the waters between the city of Seattle, State of Washington, and the port of St. Michaels, Alaska, and that one E. B. McFar-

land was the general manager and F. C. Davidge & Company were the agents of said steamship company, respondent herein, and as such were duly empowered and authorized, on behalf of said respondent and of said steamship "Eugene," to enter into and make any and all contracts for the transportation of passengers, baggage, and freight from the said city of Seattle, State of Washington, to Dawson City, Northwest Territory, via said port of St. Michaels; and your petitioners further allege, in addition thereto, that the said respondent company was, during the times herein mentioned, a common carrier of passengers, baggage, and freight between the said places, and in the prosecution of its said business as such carrier it was operating the said steamships mentioned.

III.

Your petitioner further alleges that on or about the 19th day of August, 1897, and prior and subsequent thereto, the said respondent, the Portland and Alaska Trading and Transportation Company, through its said general manager and agents, caused it to be publicly and extensively advertised that they would, on their said ships, the "Bristol" and said "Eugene," transport passengers, baggage, and freight from the city of Seattle, Washington, to said Dawson City, Northwest Territory, and would leave said city of Seattle, Washington, on or about the 20th of August, 1897, on said voyage, and that they would carry said passengers, baggage, and freight from Seattle, Washington, to St. Michaels, Alaska, upon the said steamship "Bristol," and that on said voyage the said steamship "Eu-

gene" would be towed by the said steamship "Bristol" to St. Michaels, Alaska, and at St. Michaels, Alaska, the said voyage would be continued on to said Dawson City, Northwest Territory, by the said steamship "Eugene"; that upon the good faith of said representations and particular representations made to these petitioners by the said general manager and agents of the said respondent, the Portland and Alaska Trading and Transportation Company, on or about the date aforesaid, engaged passage to make said voyage as aforesaid, and entered into a contract therefor, each for himself, with the said respondent for the conveyance of themselves and fifteen hundred pounds of baggage for each, from the city of Seattle, Washington, to said Dawson City, Northwest Territory, and by the terms thereof the said respondent, on behalf of said steamship "Eugene," contracted and agreed to prosecute said voyage with diligence, and that they would reach said St. Michaels, Alaska, on or about Sept. 10th, 1897, or within a few days thereafter, when the said steamship "Eugene" would proceed and continue the voyage to Dawson City, Northwest Territory, and land petitioners with their said baggage at Dawson City, Northwest Territory, within a reasonable time thereafter, and to that end these petitioners purchased passage for said voyage, each for himself, paying therefor the sum of three hundred dollars ($300.00), and received therefor tickets issued by the said respondent company, good for such passage.

IV.

That petitioners, on their part, complied with all the

terms and conditions of the said contract, and on or about August 30th, 1897, started upon said voyage with the said steamships, that said "Eugene," being towed by the "Bristol," which proceeded thereon from the port of Seattle, Washington, for a distance of several hundred miles upon the said high seas, when the said steamship "Eugene" and the said respondent company abandoned the said voyage, and failed, refused, and neglected to keep said contract on their part, and put said petitioners off said ship at Victoria, British Columbia, and refused to carry them and their said baggage in accordance with said contract, or at all; that by reason of the failure of the said steamship "Eugene" and of said respondent, the Portland and Alaska Trading and Transportation Company, to perform its said contract with petitioners, petitioners suffered great loss, and were subjected to great delay, annoyance and worry; that petitioners, each for himself, paid out to respondents for said passage the sum of three hundred dollars ($300.00), which respondents refused to return to them and that each for himself paid out for a miner's supply and outfit, intended for the use of petitioners at their said destination, the sum of three hundred dollars ($300.00), which has been rendered valueless to said petitioners by reason of the abandonment of said voyage; that petitioners have been, each for himself, damaged in the sum of two hundred dollars ($200.00) for the loss of seven weeks' time, to-wit, from August 18th, 1897, to October 10th, 1897, making in all eight hundred dollars damage to each of your said petitioners.

Wherefore, petitioners pray that they be permitted to intervene herein to prosecute this action as co-libelants,

upon complying with such terms as the Court may impose; that their said respective claims be allowed against the said steamship "Eugene," to-wit, that the Court decree a return to each of them of the said sum of three hundred dollars ($300.00), paid out by them for passage; that each for himself recover the further sum of five hundred dollars ($500.00) damages, in all the sum of eight hundred dollars ($800.00); that the said steamship "Eugene" be condemned and sold to satisfy the same, and for such other and further relief as to this Court may seem just.

WALTER M. CARY, and
EDWARD J. KNIGHT,

By JOHN C. HOGAN and
PATTERSON & EASLY,
Proctors in Admiralty.

State of Washington, }
County of King. } ss.

Walter M. Cary, being first duly sworn, upon oath says that he is one of the petitioners in the above-entitled action; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

WALTER M. CARY.

Subscribed and sworn to before me this 16th day of October, 1897.

G. E. de STEIGUER,
Notary Public in and for the State of Washington, Residing at Seattle, Washington.

State of Washington, }
County of King. } ss.

John C. Hogan, being first duly sworn, on oath says that he is the attorney and proctor for Fred M. Lyons, one of the petitioners in the above-entitled action, and makes this verification in his behalf, for the reason that said petitioner is not now within the above-named district of Washington; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

JOHN C. HOGAN.

Subscribed and sworn to before me this 5th day of November, 1897.

[Notarial Seal] T. H. CANN,

Notary Public in and for the State of Washington, Residing at Seattle, Washington.

Upon motion of proctors for libelants made in open court, leave to file the foregoing intervening libel is hereby granted; four days to answer.

Nov. 6, 1897. C. H. HANFORD,

Judge of said Court.

Service of the within paper on the undersigned this 5th day of Nov., 1897, is hereby admitted.

WILLIAMS, WOOD & LINTHICUM, and
STRUDWICK & PETERS,

Attorneys for Claimant.

[Endorsed]: Intervening libel of Walter M. Cary, et al. Presented and offered for filing in my office, and fee for

filing paid to me, November 6, 1897, but withheld from filing awaiting stipulation for costs. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

United States District Court for the District of Washington.

GASTON JACOBI et al.,

vs.

STEAMER "EUGENE" et al.

Præcipe for Appearance.

To the Clerk of the above-entitled court:

You will please enter our appearance as proctors for intervening libelants in the above-entitled cause.

PATTERSON & EASLY,
JOHN C. HOGAN.

[Endorsed]: Praecipe for appearance. Presented and offered for filing in my office, and fee for filing paid to me, November 6, 1897, but withheld from filing awaiting stipulation for costs. R. M. Hopkins, Clerk. By H. M. Walthew, Deputy.

In the United States District Court for the District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,
Libelants,

vs.

THE STEAMSHIP "EUGENE," and JOEL P. GEER,
Claimant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that upon the filing of this stipulation the above cause may be set down for trial by the Court so as to be tried on the 27th day of November, 1897, or on as early a date thereafter as the Court may fix. It is further stipulated that the cause as to the intervening libelants herein shall be submitted and tried at the same time as the principal cause, and shall abide the issues therein; that the answer of claimant herein shall stand as the answer to intervening libel, and all evidence introduced in reference to libelants Jacobi and Ruff shall be considered as applying also to intervening libel-

ants: and all evidence on behalf of claimants shall be considered against said intervening libelants.

Nov. 20, 1897.

STRUDWICK & PETERS, and

WILLIAMS, WOOD & LINTHICUM,

Proctors for Claimant.

JOHN C. HOGAN,

Proctor for Libelants.

PATTERSON & EASLY,

For Intervening Libelants and for Libelants.

[Endorsed]: Stipulation. Filed Nov, 24, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. By H. M Walthew, Deputy.

In the United States District Court for the District of Washington, Northern Division.

GASTON JACOBI and CHARLES RUFF,
Libelants,
vs.
THE STEAMER "EUGENE," and THE PORTLAND AND ALASKA TRADING AND TRANSPORTATION COMPANY
Respondents.
JOEL P. GEER,
Claimant.

No. 1,128.

Clerk's Certificate.

United States of America,
District of Washington. } ss.

I, R. M. Hopkins, clerk of the District Court of the United States for the District of Washington, do hereby certify the foregoing eight (8) typewritten pages, numbered from one (1) to eight (8), inclusive, to be a supplemental transcript to the original transcript on appeal in this cause, certified by me on February 3, 1898, and that the same is a full, true, and correct transcript of the inter-

vening libel of Walter M. Cary, Edward J. Knight, and Fred N. Lyons, and praecipe for appearance of John C. Hogan, Esq., and Messrs. Patterson & Easly, proctors for said intervening libelants, which said intervening libel and appearance of proctors was presented and offered for filing in my office, and fee for filing same paid to me, November 6, 1897, but withheld from filing awaiting stipulation for costs; and I further certify that the stipulation, on page 8 hereof, is a copy of the original stipulation filed in the above-entitled cause on the 24th day of November, 1897, and that a copy of said original stipulation will be found on page 126 of the original transcript in this cause; and I further certify that the intervening libel hereinbefore referred to is the intervening libel of Walter M. Cary, Edward J. Knight, and Fred N. Lyons referred to in the final decree of this Court, made and entered on the 7th day of December, 1897, a copy of which final decree will be found on pages 405 to 407 of the original transcript on appeal in this cause.

And I further certify that the reason I did not include as a part of said original transcript the intervening libel of Walter M. Cary, Edward J. Knight, and Fred N. Lyons, and the praecipe for appearance of proctors for said intervening libelants, is, that at the time of the presentation and offering of the said intervening libel and praecipe for appearance no bond or stipulation for costs was presented or offered for filing.

I further certify that the said original intervening libel of Walter M. Cary, Edward J. Knight, and Fred N. Lyons,

and the praecipe for appearance of John C. Hogan, Esq., and Messrs. Patterson & Easly, proctors for said intervening libelants, presented and offered for filing in my office on the 6th day of November, 1897, are still, and always have been since said date, in my office at Seattle.

I further certify that the cost of preparing and certifying the foregoing supplemental transcript on appeal is the sum of two dollars and thirty-five cents ($2.35), and that the same has been this day paid to me by John C. Hogan, Esq., and Messrs. Patterson & Easly, proctors for said intervening libelants.

Witness my hand and official seal at Seattle, Washington, this 8th day of February, 1898.

[Seal] R. M. HOPKINS,

Clerk.

[Endorsed]: Filed Feb. 11, 1898. F. D. Monckton, Clerk.

[Endorsed]: No. 430. In the United States Circuit Court of Appeals, Ninth Circuit. Joel P. Geer, Appellant, v. Gaston Jacobi and Charles Ruff et al. Transcript of Record. Appeal from the United States District Court. District of Washington.

Filed February 7, 1898.

F. D. MONCKTON,

Clerk.

No. 430.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JOEL P. GEER,

Appellant,

vs.

GASTON JACOBI AND CHARLES RUFF, ET AL.,

Appellees.

SUPPLEMENTAL TRANSCRIPT.

Appeal from United States District Court, District of Washington.

FILED

MAR 1 [illegible]

INDEX.

ffi page
Claimants' Exhibit "I" 3
Exhibit "A" 9
Libelants' Exhibit "Y" 4
Libelants' Exhibit "X" 4
Libelants' Exhibit "V" 5
Libelants' Exhibit "B" 10
Libelants' Exhibit "C" 10
Libelants' Exhibit "D" 12
Libelants' Exhibit "E" 13
Libelants' Exhibit "F" 13
Libelants' Exhibit "G" 14
Libelants' Exhibit "H" 17
Libelants' Exhibit "I" 18
Libelants' Exhibit "J" 18
Libelants' Exhibit "K" 2
Libelants' Exhibit "L" 2
Libelants Exhibit "O" 6
Libelants' Exhibit "P" 7
Libelants' Exhibit "Q" 7
Libelants' Exhibit "R" 8
Libelants' Exhibit "S" 8
Waiver 1

United States Circuit Court of Appeals for the Ninth Circuit.

JOEL P. GEER,

Appellant,

v.

GASTON JACOBI et al.,

Appellees.

Waiver.

Appellant Joel P. Geer waives all error assigned upon his appeal touching or concerning the condition of the weather and sea at the time the steamboat "Eugene" returned to Alert Bay, to which the testimony of the witnesses for claimants Stearns, Toutfest, Toutfest and McFarland related.

WILLIAMS, WOOD & LINTHICUM,

Of Proctors for Appellant.

[Endorsed]: Filed Feb. 25, 1898. Frank D. Monckton. Clerk. By Meredith Sawyer, Deputy Clerk.

Libelants' Exhibit "K."

No. 6.

Portland and Alaska Trading
. . . . . and Transportation Co.

GOOD FOR ONE
.... PASSAGE ....
FROM
ST. MICHAELS, ALASKA,
TO
DAWSON CITY, N. W. T.,
VIA S. S. EUGENE

Name **GUSTAV JACOBI**

E. B. McFARLAND,
General Manager.

[Endorsed]: R. E. Mercy, S. W. Baker, G. Jacobi; 3 in party; 4155 lbs., 144 ft.

Filed Nov. 12, '97, A. C. Bowman, U. S. Comr.

Filed Nov. 29, 1897, in the U. S. District Court. R. M. Hopkins, Clerk. By A. N. Moore, Dep.

Libelants' Exhibit "L."

Sept. 3rd, '97.

Received from G. Jacobi, ticket No. 74, good for one passage from Victoria to St. Michaels.

J. H. JOHNSON,
Purser, S. S. "Bristol."

[Endorsed]: No. 1128. Jacobi vs. S. S. "Eugene."

Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

Filed Nov. 29, 1897, in the U. S. District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

Claimants' Exhibit "I."

No. 79.

STEAMSHIP

P. & A. T. & T. CO.

GOOD FOR ONE

PASSAGE

From **VICTORIA, B. C.**

To **ST. MICHAELS**

Per SS. **BRISTOL**

Intended to sail on or about

Aug. 30, 1897.

Subject to the following Contract:

That if accommodation superior to that covered by this ticket is desired, the additional charge, if any, must be paid by the holder hereof to the Agent of the S. S. Bristol.

That this **ticket** is not **transferable** and if presented by any other than the ORIGINAL purchaser, whose signature appears below, it will be void.

That this ticket is issued subject to conditions under which steamship tickets are sold.

Good for ¾ ton Measurement Free Baggage.

I agree to the conditions stipulated hereon

T. V. LYONS

Signature.

J. H. GREER,

Witness.

Per pro F. C. DAVIDGE & CO.,

Agents.

[Endorsed]: Lyons, Crabb. 2. 1935 lbs. 61 ft. E. Filed Nov. 12, 1897. A. C. Bowman, U. S. Comr.

Filed Nov. 29, 1897, in the U. S. District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

Libelants' Exhibit "Y."

No. 100

Portland and Alaska Trading
.... and Transportation Co.

GOOD FOR ONE

....PASSAGE....

FROM

ST. MICHAELS, ALASKA,

TO

DAWSON CITY, N. W. T.,

VIA S. S. EUGENE

Name ....

.... **E. B. McFARLAND** ....
General Manager

[Endorsed]: No. 1128. Jacobi vs. Str. "Eugene."

Filed Nov. 15, '97. A. C. Bowman, U. S. Comr.

Filed Nov. 29, 1897, in the U. S. District Court. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

Libelants' Exhibit "X."

Order No. 95 SEATTLE, WASH., AUG.........., 1897

To F. C. DAVIDGE & CO., Managers S. S. Bristol, Victoria, B. C.

This order when presented by Mr............ .... entitles him to berth accommodations and meals; and transportation for three quarters of a ton (measurement) of freight and baggage, Victoria B. C., to St. Michaels.

....Agent.

[Endorsed]: No. 1128. Jacobi vs. Str. "Eugene."

Filed Nov. 15, '97. A. C. Bowman, U. S. Comr.

Filed Nov. 29, 1897, in the U. S. District Court. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

Libelants' Exhibit "V."

F. C. DAVIDGE & CO.,
SHIPPING AGENTS, COMMISSION MERCHANTS
AND IMPORTERS OF
JAPANESE PRODUCE AND MANUFACTURES.

Telegraphic Address:
DAVIDGE.

CODES:
A. B. C. 4TH ED.
AGER'S,
A. 1.

GENERAL AGENTS
OREGON-ASIATIC S. S. LINE
(HONOLULU, JAPAN AND CHINA.)
OREGON-AUSTRALIAN S. S. LINE
(SYDNEY DIRECT)

VICTORIA, B. C., Board of Trade Building
PORTLAND, OR., Worcester Block

Portland, Oregon, 17th August, *1897*

G. W. Gould, Esq.,

Seattle, Wash.

Dear Sir:—

In case you do not fully understand instructions, we beg to advise that we have already sold twenty tickets for St. Michaels and expect at least twenty more, and will draw an order on you for ticket Seattle to Comox, meeting point of "Bristol". We will endeavor to get these passengers together, but a number wish to purchase their outfits at Seattle, and will be going up from day to day with orders for tickets. You understand that arrangements with the Portland & Alaska Trading Co. are as follows— We are to receive $300. for each tickets sold until we are fully paid as per contract, and we are to pay the freight charges and half the passenger fare from Seattle to Comox. We trust you will keep us fully advised as to the number of tickets sold, and the amount of money, as we have to advise the Bank regularly. We

have reserved fifty tickets for Portland, the balance for the Sound points, as per arrangements with Mr. Johnson.

Wishing you success,

We are, Dear Sir,

Yours faithfully,

F. C. DAVIDGE & CO.

P. S. Tickets from St. Michaels to Dawson City do not include meals, only bed and 1500 lbs. baggage free. We understand Mr. McGuire is with you and will fully advise as to river arrangements.

F. C. D. & CO.

[Endorsed]: No. 1128. In U. S. Dist. Court. Jacobi v. Str. "Eugene." Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

Filed Nov. 29, 1897, in the U. S. District Court. R. M. Hopkins. Clerk. By A. N. Moore, Deputy.

Libelants' Exhibit "O."

38 Vr. Fa. 11:10 paid. Received at Seattle, Wash.

Victoria, B. C., Aug. 30th. First Ave. Foot of Cherry St.

Mr. Gould,

Davidge's & Co's Agent,

Seattle, Wn.

Telegraph immediately net amount booked since last statement given me.

E. B. McFarland.

11.10 A. M.

[Endorsed]: No. 1128. Jacobi v. Str. "Eugene." Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

Filed Nov. 29, 1897, in the U. S. District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

Libelants' Exhibit "P."

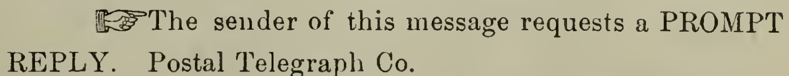
Po. 47. A. S. 12 Paid. Received at Seattle, Wash.
Portland, Ore., Aug. 21st,'97. First Ave. Foot of Cherry St.
W. W. McGuire,
Seattle, Wn.,
Accept Canned Syrup rate TEN cents per pound. Banked SEVENTY FIVE HUNDRED.
E. B. McFarland.
3:45 p. m

[Endorsed]: No. 1128. Jacobi vs. Str. "Eugene." Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

Filed Nov. 29, 1897, in the U. S. District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

Libelants' Exhibit "Q."

Po. 20. E. S. 6 Paid. Received at Seattle, Wash.
Portland, Ore., Aug. 23rd, '97.
W. W. McGuire,
Seattle, Wn.,
Have outfits been re-shipped to VICTORIA.
E. B. McFarland.
1:45 p. m.


☞The sender of this message requests a PROMPT REPLY. Postal Telegraph Co.

[Endorsed]: No. 1128. Jacobi vs. Str. "Eugene." Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

Filed Nov. 29, 1897, in the U. S. District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

Libelants' Exhibit "R."

28 Vr. Q. Y. 35 Paid. Received at Seattle, Wash.
Victoria, B. C., Aug. 19th,'97 First Ave. Foot of Cherry St.
W. W. McGuire,

Hotel Butler, Seattle, Wn

Tickets coming in marked fifteen hundred pounds baggage instead of measurement basis. Do you provide meals free on the EUGENE. If not what is cost of meals and may passengers take their own if preferred.

F. C. Davidge & Co.

11.35 A.

[Endorsed]: No. 1128. Jacobi vs. Str. "Eugene." Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

Filed Nov. 29, 1897, in the U. S. District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

Libelants' Exhibit "S."

Po. 7. E. S. 8 Paid. Received at Seattle, Wash.
Portland, Ore., Aug. 23rd,'97. First Ave. Foot of Cherry St.
H. P. McGuire,

Seattle, Wn.,

Cap't. Lewis reports from Port-Angeles Eugene arrived safely.

E. B. McFarland.

10.18 a.

[Endorsed]: No. 1128. In the U. S. Dist. Court. Jacobi vs. Str. "Eugene." Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

Filed Nov. 29, 1897, in the U. S. District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

Exhibit "A."

To Dawson City this Year!

The S. S. BRISTOL to St. Michaels & Steamer EUGENE St. Michaels to Dawson City Direct.

MONDAY, AUGUST 23.

THREE-FOURTH OF A TON OF FREIGHT AND BAGGAGE FREE WITH PASSAGE.

Fare, Seattle to Dawson City, $300

C. W. GOULD, Agt., 619 First Av., Seattle.

[Endorsed]: No. 1128. Jacobi vs. St. "Eugene." Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

Filed Nov. 29, 1897, in the U. S. District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

Libelants' Exhibit "B."

[P. I. Aug. 17.]

EUGENE FOR DAWSON CITY.

The Bristol Will Take the Eugene to St. Michaels.

The Bristol left Comox yesterday morning after taking on a cargo of coal. She will leave Seattle August 23 for St. Michaels, having in tow the Eugene. Arriving at the mouth of the Yukon passengers and freight will be transferred to the Eugene, which will at once hasten up the river, and, being a fast boat, is expected to reach Dawson City by September 15. She will remain there all winter and will be utilized as a hotel. The Yukon does not begin to freeze until October 1, and then only at the mouth, so that there will be ample time for passengers to prepare for the winter before the ice forms in the upper waters.

The passengers will travel on the Bristol to St. Michaels. She has room for 1,000 passengers, but will only carry about 350, that being the capacity of the river boat. She ought to reach St. Michaels September 3. She has ben thoroughly overhauled and is one of the finest boats to leave this port. The entire trip will be under the direction of Capt. Lewis, who is familiar with the northern waters and Yukon river, having been in the service for fifteen years.

Passengers are being booked at Portland, Seattle and Victoria, and Davidge & Co., who conduct the service, have opened an office at 619 First avenue. The fare is $300 for the entire trip and each passenger is allowed to carry 1,500 pounds of baggage free.

Filed Nov. 12, '97. A. C. Bowman, U. S. Com.

[Endorsed]: Filed Nov. 29, 1897, in the U. S. District Court. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

Libelants' Exhibit "C."

[P. I. Aug. 18.]

SALES FOR THE BRISTOL.

The Portland-Alaskan Transportation & Trading Company Begins Business in Seattle.

The Portland-Alaskan Transportation & Trading Company opened its Seattle place of business in the offices of the Southern Pacific Railroad on Pioneer place, 619 First avenue, yesterday morning, and at once commenced the sale of tickets at the rate of $300 to Dawson City, to include three-quarters of a ton of baggage free to each passenger. Secretary W. W. McGuire, who remains in Seattle to represent the company, stated last evening to a representative of the Post-Intelligencer that the sale of tickets exceeded his most sanguine expectations, the excitement attending the affairs of the Humboldt seeming to accentuate rather than diminish the anxiety of people to secure transportation facilities to St. Michaels and the upper Yukon. Mr. McGuire thinks that his company has a strong argument in its favor in its intention to limit its passenger list on the Bristol to the carrying capacity of the Eugene, which is to be towed north by the ocean-going steamship. The Bristol has ample capacity for several hundred more passengers than she will take, but the intention is to hold down to 300, or possibly less, as the Eugene cannot accommodate more than that number comfortably, and carry the liberal allotment of freight and supplies given to each. There will be no crowding and there will be ample breathing space, as the Portland-Alaskan Transportation and Trading Company does not intend to open any stores, nor will it carry any freight of its own beyond temporary supplies for the voyage. Another thing which will appeal par-

ticularly to those scanning their chances for reaching the gold fields for the coming winter will be that the Eugene will be ready to transfer the freight and passengers at the mouth of the Yukon and proceed at once up the river. Regarding the preparations of the Eugene for sea, the Oregonian of yesterday morning said:

"The Eugene was yesterday moored close to the western end of the Morrison-street bridge, preparatory to receiving a few finishing touches of the work of placing her in readiness for the voyage to St. Michaels. She was the object of interest to a considerable crowd that hung over the bridge rail all day talking Klondike and commenting on the Eugene's appearance. The steamer has clearly been remodeled less with an eye to beauty than to seaworthiness. A powerful bulwark has been put up on either bow, and her sides have been retimbered so they extend to the roof of the cabin nearly its entire length. Powerful fore and aft braces have been put in place, the steering wheel has been taken down from the pilot house and set up on the deck below, and the propelling wheel has been greatly strengthened. Altogether, the Eugene, if her sides were of iron plates instead of boards, would remind one strongly of one of those old Mississippi river steamers cut down and armored into gunboats of 1864-65."

There is no doubt that the limited freight space and passenger list that the company allows to the Bristol will be all taken, and the proposition of the Eugene being allowed to freeze upin the river and be used as a hotel is attractive as an assurance of an abiding place during the winter for such as will remain in Dawson City, and who are unable to arrange for other acommodations. Mr. McGuire, besides being more than pleased at the outlook for his company, says that every effort will be made to check in and take care of the passengers' baggage. He says that the Eugene will be the first boat that will be ready to come down the river in the spring, as she will be at Dawson City when the ice breaks up. A number of the railroad officers of both Seattle and Portland are in receipt of telegraphic and mail inquiries concerning the Bristol, her accommodations and sailing date. People have made up their minds that the only way to get into the Klondike this year is by the St. Michaels and the river route, and from this fact the Portland-Alaskan Transportation & Trading Company expects to profit on its initial trip. The crowds seeking a means of getting up the river are still coming to Seattle daily, and the company is using every legitimate means to let the public know of its intentions.

Mr. McGuire says that he has been impressed with the character of the men who have inquired about the Bristol's sailing and who have purchased transportation on her. A large percentage of them are college men and professional men, and they are as well equipped physically as the majority of the travelers northward who have had fewer advantages. The fact of these men being of a high grade, intellectually, will result in the placing of information concerning Alaska before the public in its proper light. This will be a distinct advantage to the country and to those doing business with the north. The purchase of the government survey steamer Hassler by the McGuire brothers means her employment in the Seattle-St. Michaels' trade. She is thoroughly seaworthy, but will undergo an overhauling.

Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

[Endorsed]: Filed Nov. 29, 1897 In the U. S. District Court. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

Libelants' Exhibit "D."

[P. I. Aug. 19.]

FOR DAWSON CITY DIRECT.

The Bristol Preparing to Make a Record-Breaking Trip Into the Yukon.

Since the Humboldt has departed the last opportunity for any person to reach the Klondike mines this season by way of St. Michaels and the river steamers, is afforded by the Bristol, which leaves Victoria August 24th. The Bristol will have in tow the stern wheel steamer Eugene, which left the Columbia river Tuesday, en route for Victoria. The Bristol does not propose to be sparing of her fuel, and will make an effort to beat the record between Victoria and St. Michaels, even taking into consideration the fact of her tow.

While the Bristol has accommodations for nearly 600, her passenger list for this voyage will be limited to 250, that being the total number that can be accommodated by the Eugene on the trip up the river; and the comparatively limited accommodations of the latter vessel necessarily determines the number of tickets to be sold, as all passage is to Dawson City, and not alone to St. Michaels.

The Portland-Alaska Transportation and Trading Company, charterers of the Bristol, opened their Seattle offices on Tuesday, at 619 First avenue, in the same office already occupied by the Southern Pacific Railway Company. C. W. Gould was yesterday installed as resident agent. There will be no apparent difficulty in filling out the full quota of passengers, for already telegrams are pouring in from all parts of the United States asking that passage be reserved on her for parties of from two to six or larger. Reservations have already been made for several ladies, who propose to get into Dawson City before the winter sets in.

Each passenger by this route is allowed three-quarters of a ton of personal outfit, and in view of the experiences of some other vessels, the company has decided to refuse to handle any freight for outside parties until it is definitely determined precisely how much freight the passengers propose to take.

The Bristol left Victoria for Dyea and Skaguay on Sunday last. She is probably at one or the other of those ports at present, discharging her cargo, but she will certainly return in time to take her departure for St. Michaels at the time set, August 24th.

It is expected that the voyage from Victoria to the mouth of the Yukon will be made in ten to twelve days, and from thence up the river in ten days. This is calculated from the basis that the Eugene, which has run on the Columbia and Willamette rivers at a speed of 12 miles per hour can make the same time on the Yukon, out reckoning the distance at 1,900 miles from the mouth to Dawson City, and averaging 8 miles an hour for the steamboat this would bring the Eugene into Dawson City in less than ten days. Adding the time of reaching the mouth of the Yukon by the Bristol makes twenty-two days. Leaving August 24 from Victoria the passengers and freight will reach Dawson City on September 15.

This is fully two weeks before the time when the river has been known to close with ice, even in unfavorable seasons. The usual time for the closing of the river to navigation is after October 5. Last year, for example, Mr. Ogilvie, the Canadian surveyor in charge of the international boundary survey, did not make his preparations for leaving the country until late in September. The river has been known

to remain open until October 15, and even later.

Secretary W. W. McGuire and Resident Agent Gould, of the company, were about the busiest men in Seattle yesterday, attending to the wants of passengers and looking after new arrivals who are booked for passage on the Bristol. A party of five arrived over the Northern Pacific while others came from Portland and California, and the books of the company even showed arrivals from the orange groves of Florida. A crowd from Chicago reached Seattle last evening, bound for Dawson City by way of St. Michaels. Mr. F. C. Davidge wired late last evening from Victoria that the steamer Bristol would be back on time. Mr. McGuire also received a dispatch last evening that thirty had been booked at Portland yesterday.

Filed Nov. 2, '97. A. C. Bowman, U. S. Comr.

[Endorsed]: Filed Nov. 29, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

Libelants' Exhibit "E."

[P. I. Aug. 15.]

FOR DAWSON CITY.

Passengers Will Take the Bristol for St. Michaels.

The Portland Oregonian of Saturday says: "The steamer Eugene, under management of the Portland and Alaska Trading and Transportation Company, will leave Portland Tuesday night for Puget Sound. The Eugene will make the outside trip to the Sound in tow of one of the O. R. & N. tugs. The passengers engaging transportation to the Yukon river will leave Portland in time to connect with the steamer Bristol at Seattle, on which they will embark for St. Michaels, which will be reached by September 2, with the steamer Eugene in convoy. Reaching the mouth of the Yukon, no time will be lost in transferring the passengers from the Bristol to the steamer Eugene, and the start for Dawson City will be begun. The Eugene being of light draught, and with nothing in tow, the trip to Dawson City will be made in ten days or less, landing all the passengers in the heart of the new gold fields in ample time to prepare winter quarters preparatory to commencing active work in the hunt for gold.

Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

[Endorsed]: Filed Nov. 29. 1897. In the U. S. District Court. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

Libelants' Exhibit "F."

[P. I. Aug. 13.]

EUGENE FOR DAWSON CITY.

Will Take the Bristol's Passengers Up the Yukon River.

PORTLAND, Or., Aug. 12.—Owing to a change of plan, the stern-wheel steamer Eugene will leave this city August 20 for the Alaskan gold fields. The vessel will be towed from Astoria to Victoria, where she will be taken in charge by the steamer Bristol, which is scheduled to sail August 22. Arriving at St. Michaels, the Bristol's passengers and freight will be transferred to the Eugene, which will carry them up the Yukon to Dawson City, which place will be reached about September 11.

[P. I. Aug. 20.]

TO MAKE A FAST VOYAGE.

The Steamship Bristol's Trip to the Mouth of the Yukon River.

Now that the Humboldt is fairly on her way to St. Michaels, the general drift of conversation on the streets and in the stores about the city has turned to the coming trip of the large, staunch, and speedy steamship Bris-

tol, which is billed to sail on the 23d of August. Although the number of passengers is to be limited to 250, the event of her passengers leaving Seattle will be the cause of as large a crowd turning out to see them off as any boat that has yet left for the north.

It is expected of the Bristol that she will break the record by landing her passengers in Dawson City in shorter time than any boat that has yet left for that place. Those taking passage on this steamer expect to reach their destination by September 17, making the remarkable quick time of twenty-four days from the time she leaves Victoria dock. If the company's boat succeeds in doing this, they will surely deserve much credit and also the praise of the passengers. Next year there will be so many boats on the Yukon that it will be a feature of transportation of which company can make the best connections with the river boat and land passengers ahead of competing lines.

The Portland and Alaska Trading and Transportation Company hope to make a record for themselves on the first trip and to place their company in the front rank for quick transit.

The load of passengers that will leave on the Bristol on the 23d inst. will be about as jolly a crowd as will have left Seattle. A gentleman and wife engaged passage yesterday afternoon, and intend taking a piano along as part of their fifteen hundred pounds allowed on their tickets. The instrument will be placed in the cabin and used for the amusement of the passengers. This, together with several Eastern people who are rather good singers and comedians, will tend to make up a merry crowd.

Secretary McGuire informed a representative of the Post-Intelligencer yesterday afternoon that "he thought the Bristol would arrive off the mouth of the Yukon in ten or twelve days after leaving Victoria, which ought to bring her there about September 5. The Eugene, after receiving her freight and passengers, would proceed at once on her way to Dawson City. Being equipped with good machinery, she will no doubt make a quick trip and land her cargo and passengers in the heart of the gold fields long before any ice makes its appearance in the river."

There seems to be no abatement in the number of passengers seeking tickets by this route, and, no doubt, in a day or two all of the tickets will be taken, as the agent of the company states that under no consideration will they issue any more tickets than was first agreed on, and the books will be closed as soon as the last ticket of the allotted number is taken. This being the last boat by the Yukon, no doubt many will be disappointed in securing passage.

Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

[Endorsed]: Filed Nov. 29, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

[P. I.—Aug. 21.]

Libelants' Exhibit "G."

THE BRISTOL NEXT.

Taking the Eugene With Her to St. Michaels Ready for the Yukon.

There is apparently no abatement in the interest taken by prospective gold seekers in their efforts to reach the Klondike before winter sets in, judging from the business being transacted over the counter of Agent Gould, representing the Portland and Alaska Transportation and Trading Company.

Reservations on the Bristol were being rapidly taken up by those who had

secured accommodations, and indications at the close of business yesterday were that not a single berth would remain unsold, covering the complement of passengers the steamer Eugene can take care of on the Yukon.

There can scarcely be any doubt that those going on the Bristol are most fortunate in the opportunity presented of reaching the gold fields with a minimum of care and hardships. This company secured the Willamette river steamboat Eugene, a vessel of large carrying capacity, powerful and speedy engines, yet light draught, and capable of navigating the shallowest of waters. Capt. Lewis, a man of many years' experience in Alaskan waters and upon the Yukon, was secured to take command of her and place her in seagoing condition. A large amount of money has been expended in strengthening her to ride the waves of the Pacific, and many experienced deep water navigators having seen her, declare she will ride the water like a cork. The Eugene left Portland on Thursday under her own steam, but will be conveyed to Victoria by one of the Oregon Railway & Navigation Company's tugs, where she will await the arrival of Seattle passengers booked for the Bristol.

This powerful steel steamer will on Tuesday take the Eugene in tow, the latter continuing under her own steam, and speed her to St. Michaels. The Eugene had five ladies as passengers on leaving Portland, who desired having the experience of traveling on a stern wheel steamboat on the Pacific Ocean, probably the first instance of the kind in the world.

No passengers will be carried on the Eugene from Victoria, only the working crew of the steamer being aboard. Although the carrying capacity of the Bristol is 600 persons, only 250 tickets will be sold for her, that being the capacity of the Eugene, and no freight will be taken other than the 1,500 pounds allowed to each passenger as his supplies. It will thus be manifest that there will be no delay at St. Michaels, the Eugene being brought alongside her convoy, freight and passengers transferred, and the speedy stern wheeler proceed on her long journey up the Yukon.

Leaving Victoria on Tuesday, August 24, the Bristol is to be crowded in her speed, with the view of reaching St. Michaels, as she undoubtedly will, by September 3 to 5. Transferring her passengers and freight to the Eugene direct, it will not be necessary for her to go further than the mouth of the Yukon, thus saving many miles and much time. While the Eugene is a fourteen-knot boat, she will not be steamed over ten, which will enable her to cover the 1,900 miles to Dawson City in eight days, or arriving there by September 13 to 15, or fully half a month before the usual date of close of navigation.

Telegrams are coming in from all over the country requesting space for passengers en route to Seattle, hoping to get into the Klondike before freezing up of the rivers. It looks as though many are to be disappointed, as the company will decline to book over the allotted number of 250.

It will not all be seriousness on board the Bristol on her voyage, as a gentleman and wife are taking with them their piano, which will be the second instrument of the kind taken into Dawson, and midst song and music will speedily pass the hours of her passengers.

From what a representative of this paper saw on a visit to the company's office yesterday, the passenger list of the Bristol will represent a particu-

larly well-to-do and intelligent people. all going thoroughly outfitted and equipped for a long stay in the Arctic region, the most of which have been purchased in Seattle. Secretary W. W. McGuire is here, looking after the interests of passengers personally. and no effort is to be spared upon the part of the officials of the company to push these boats through and successfully carry out this expedition, as next year the company will be prepared to operate on a very extensive scale from this city, one steamship having been already purchased, while its representatives are quietly building and chartering others, which will be operated conjointly between here and Dawson City.

Following is a list of passengers booked yesterday:

Thomas Rasmussen.
Wm. Schwanbauer.
C. Kramer.
Charles Greene.
J. O. Pooley.
A. J. McMaster.
L. C. Karrick.
James Powell.
Thomas Cooke.
W. F. Hall.
D. W. Semple.
V. L. Rockwell.
Rudolph Mercy.
J. D. Hamlin.
S. W. Baker.
Gus Jacobi.
J. T. Lenaghen.
A. Jorgens.
A. T. Mattison.
C. H. Hall, Jr.
Geo. C. Franklin.
W. T. Prescell.
E. B. French.
Charles Ruff.
H. Stevens.
C. G. Copeland.
C. C. Douglass.
W. H. Stetson.
H. C. Bramer.
Sam Hubbard.
Dr. H. L. Carlis.
O. T. Switzer.
D. Burdon.
James R. Hayden.
H. H. Brewer.
W. L. Mabry.
A. D. McFarland.
G. C. Van Ness.
E. E. Adams.
W. H. Hanson.
James Main.
Ed Stearns.
J. W. Stingle.
J. F. Kelly.
Miss Annie Tantvest.
Miss Cora Service.
E. E. Koroh.
J. T. Ferrine.
E. T. Telfer.
Grant Vaughn.
Mrs. Grant Vaughn.
W. Devine.
Mrs. Martha Tantvest.
Miss Bertha Hamilton.
J. C. Hungerford.
William Randall.
Mrs. W. H. Stetson.
A. L. Blaney.
J. L. Spiegel.
Thos. B. Armstrong.
C. H. Moore.
Geo. A. Johnson.
A. C. Lohmann.
W. H. Elton.
William B. Nye.
E. Eller.
John Romche.

It is expected that the Portland and Victoria list of passengers will be received to-morrow.

D. W. Semple, of the Evening Telegram, of Portland, goes through to Dawson City, and will act as special correspondent of that paper, from whose pen the Telegram readers may expect to have some racy descriptions of life in the Arctic circle.

Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

[Endorsed]: Filed Nov. 29, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

Libelants' Exhibit "H."

[P. I. Aug. 22.]

THEY GO TO-MORROW.

The Bristol's Passengers for Dawson City Direct.

From Pittsburgh, Cincinnati, St. Louis, and even from way down in Maine are passengers rushing toward Seattle as fast as hurrying railway trains can carry them, tapping the wires at various points and asking the officials of the Portland and Alaska Transportation and Trading Company if they can be provided with accommodations on their steamers Bristol and Eugene for the Klondike. It is now conceded by even the most inexperienced that the best and most feasible proposition of reaching the mines is that of the Eugene from the mouth of the river.

On arrival at the Yukon, with no boats to build, but one under her own steam ready to make the trip, presents features which must gladden the hearts of those booked by the Bristol, particularly when he is advised of the great number of people now lying at the passes which face the prospector in his journey overland. Many of the vacant berths on the Bristol were taken yesterday, and as the time of leaving approaches, the anxiety to get away simply increases in the ambition of those who would struggle with the thousands now finding their way into the country of gold, gold, gold.

The officials of the company yesterday received a telegram from General Manager McFarland, of the Portland and Alaska Transportation Company, that the Eugene had passed out over the Columbia bar safely on Friday afternoon, and when last seen with her nose pointed to the north, was making rapid progress in her voyage to Victoria, where she will be taken in tow by the big ocean steamship Bristol.

Could the Eugene handle the freight offered to the Bristol for transportation to Dawson City, the latter vessel would carry an immense cargo, but it has to be declined, as only the amount of freight that the Eugene can carry will be taken.

Passengers for the Bristol's trip will leave Seattle to-morrow evening on the steamer City of Seattle, arriving in Victoria Tuesday morning, and thence direct to the mouth of the Yukon with the Eugene at her tow-bits.

Every indication points to a most successful termination of the first trip of this line in its transportation business, and there is not one of the complement of her passengers but what are absolutely confident that by September 15 they will be busy with whip-saw and ax putting up their cabins in Dawson City and there establish their winter quarters, with fully fifteen days to their credit before the close of navigation. If this is consummated it will place them in a most superior position for not only work during the winter, but the first prospecting in the spring of 1898.

An interesting statement was made yesterday by a passenger for the Bristol booked from Chicago, and a friend of P. B. Weare, of the North American Transportation and Trading Company, in which he said: "I was told by Mr. Weare to get to Seattle and take the first steamer for St. Michaels and the Yukon, as I would probably have until the middle of October to get up the river; that the rush in the spring would surpass the most vivid imagination, and that all the boats possible to be built between now and spring could not handle the business, and rates, instead of being lower, or even remaining as at present, would

more than likely be considerably higher."

Only a few more vacancies are afforded now by this line.

Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

[Endorsed]: Filed Nov. 29, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

Libelants' Exhibit "I."

[P. I. May 23.]

THE BRISTOL TONIGHT.

A Large, Well-Equipped Party will go from Seattle to Dawson City Direct.

Another large party of gold seekers will leave Seattle this evening on the City of Seattle for Victoria, there to take the big ocean-going steel steamer Bristol for St. Michaels and Dawson City.

The personnel of the Bristol's passengers is of an unusually high grade, and will have probably the best equipped lot of prospectors and those intending to go into business, commercial and otherwise, that ever left Seattle. They are mainly business men from various parts of the country, who have weighed well their chances of getting through to the mining fields before the freezing up of the river, and having done so, are convinced from the most authentic information obtainable that this is the most feasible plan, and affords almost a positive assurance that the Bristol's passengers will be engaged in whatever they may have decided to undertake, with lays to spare, before Dawson is closed to Yukon navigation.

It may be safely stated that as the various reports of more enormous finds are already coming in, prior to the return of the treasure ship Portland, not a single berth will remain untaken when the City of Seattle pulls away from Yesler dock this evening.

Ticket Agent Gould was a busy man in the company's office on Pioneer square yesterday and added several more to the passenger list.

President H. S. McGuire, of the Portland and Alaska Transportation Co., arrived in this city last evening with a Post-Intelligencer man stated from Portland, and in an interview that everything was most favorable for the success of this first expedition of the company. That every report from Alaska showed a late spring, an exceedingly warm summer, melting an unusually large volume of snow, and indications pointed to a late fall. He is quite confident that the Eugene will surprise many people on her run to Dawson. The City of Seattle will leave from Yesler dock this evening at 9:30. The few remaining vacancies may be reserved to-day at the company's office, No. 619 First avenue.

Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

[Endorsed]: Filed Nov. 29, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. A. N. Moore, Deputy.

Libelants' Exhibit "J."

[P. I. Aug. 24.]

OFF FOR THE MINES.

A Big Crowd Left Last Night to go on the Bristol.

Yesler dock last night was the scene of another big outpouring of the people to see the crowd who had taken passage on the City of Seattle bound for Victoria, at which point they are to embark on the steamer Bristol for St. Michaels, having in tow the commodious stern-wheel steamboat Eugene, which takes her place on the Yukon river in the service of the Portland and Alaska Transportation Company.

It was with great satisfaction President H. P. McGuire, of the Portland

and Alaska Transportation and Trading Co., upon entering his office at an early hour yesterday morning, received a telegram from Capt. Lewis, dated at Port Angeles, saying: "Arrived here safely and on time calculated last evening. Awaiting steamer Bristol." Capt. Lewis, who is to command the Eugene on the Yukon, is one of the oldest and most experienced navigators on the Pacific coast and in the waters of Alaska is probably one of the most efficient and capable pilots known to that section. On arrival on the Yukon Capt. Lewis will remain in the employ of the company and operate the Eugene on that river.

The United States survey steamer. Hassler is now the property of this company, and on completion of intended improvements to be made on her, will be placed in commission and operate between Seattle and St. Michaels, connecting them with the Eugene.

But to return to the scenes of last evening. It was an immense throng to be seen on the usual busy Yesler dock. The warehouse was piled high with the outfits of the adventurous prospectors, which the deckhands of the City of Seattle were hustling upon that boat.

Around the passengers were friends and their families, wishing them Godspeed on their journey of nearly 5,000 miles. With such scenes Seattle is now familiar, and this was but one of almost daily occurrence. One thing might be said, however, that probably no lot of passengers ever left this city better or more thoroughly equipped in every particular for a stay in Alaska and to combat the rigorous climate of that section than those which left here last night to go on the Bristol. They were all men of fine physique, men of apparently good circumstances and intelligence, who were going north with the intention of abstracting from nature the gold which all accounts show to be prolific in the icy region of the Arctic.

All day yesterday the offices of the company were besieged with late comers, taxing the ability of Agent Gould and his assistants to the utmost to serve all applying for accommodations. President H. B. McGuire and Secretary W. W. McGuire were, in terms of the world, busy as nailers consummating the forwarding of their steamers and plans for the future of the company. It is conceded that Seattle requires no commendation as to her hustling abilities, and if such is the case, these two gentlemen require making no apology in the same direction. In fact, it was quoted upon the streets yesterday that the Messrs. McGuire now identifying themselves with our city's interests, had set a pace which would add much to Seattle's progressiveness and welfare. A number of passengers who had decided to go in via Dyea or Skaguay, in fact were in possession of their tickets, sacrificed them at heavy discounts in order to reach Dawson City without the hardships of the pass or the overland route.

The weather indications as shown by the government charts show the most favorable probability for the Bristol with her tow, the Eugene.

Owing to the large amount of baggage and freight to be handled for her not be able to clear from Victoria for St. Michaels before Wednesday, so that those who were unable to get passengers, the Bristol will probably away on the City of Seattle last evening may leave here on this boat tonight and have ample time to connect with the Bristol on Wednesday morning.

Filed Nov. 12, '97. A. C. Bowman, U. S. Comr.

[Endorsed]: Filed Nov. 29, 1897. In the U. S. District Court. R. M. Hopkins, Clerk. By A. N. Moore, Deputy.

430

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE STEAMBOAT EUGENE.
GASTON JACOBI and CHARLES RUFF,
Libellants and Appellees.
JOEL P. GEER, *Claimant and Appellant.*
WALTER M. CARY, FRED M. LYONS, and EDWARD J. KNIGHT, named in the decree as intervenors, *Appellees.*

Brief for Appellant.

STRUDWICK & PETERS,
WILLIAMS, WOOD & LINTHICUM,
Proctors for Appellant.

FILED
FEB 16 1898

PORTLAND, OREGON:
F. W. BALTES AND COMPANY, PRINTERS, 228 OAK STREET.
1898.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE STEAMBOAT EUGENE.
GASTON JACOBI and CHARLES RUFF,
Libellants and Appellees.
JOEL P. GEER, *Claimant and Appellant.*
WALTER M. CARY, FRED M. LYONS, and EDWARD J. KNIGHT, named in the decree as intervenors, *Appellees.*

Brief for Appellant.

STATEMENT OF THE CASE.

This appeal is taken by Joel P. Geer, claimant of the steamboat Eugene, from the decree of the United States District Court for the District of Washington, Northern Division, against said steamboat, in favor of libellants and of Walter M. Cary, Fred M. Lyons and Edward J. Knight, named in the decree as intervenors, each in the principal sum of $800.00, aggregating $4,000.00, and directing that a writ of venditioni exponas issue against said vessel, to enforce such decree.

The proceeding is one in rem, brought by libellants to recover damages for breach of an alleged contract for the carriage of said persons from Seattle, Washington, to Dawson City, N. W. T., upon a continuous voyage alleged as agreed to be undertaken by a steamship known as the Bristol and the said steamboat Eugene, which voyage, it was alleged, was abandoned by the Eugene when on the high seas.

To said original libel claimant filed exceptions, which were sustained by the court; whereupon, upon leave granted therefor, libellants filed an amended libel, which in substance alleged:

That the Eugene was owned and operated by a corporation named the Portland & Alaska Trading & Transportation Company, which was a common carrier of passengers, baggage and freight between Seattle and Dawson City; that one E. B. McFarland was general manager and one C. W. Gould agent of said corporation and of said steamboat, and that at the time said corporation operated a steamboat known as the Bristol.

That on August 11, 1897, the steamboat Eugene caused it to be advertised that said vessel, in tow of the steamship Bristol, would leave for Dawson City on August 23, 1897, carrying passengers, baggage and freight, and would reach Dawson City by September 15, 1897; that, relying upon the good faith of said advertisements and oral representations, libellants entered into a contract with the Eugene, wherein and whereby the Eugene undertook and agreed to carry them from Seattle to Dawson City via St. Michael's, Alaska, and that it would leave Seattle on August 24, in tow of the steamship Bristol, and would be

towed by the Bristol from Seattle to St. Michael's, from which place the Eugene would continue said voyage alone up the Yukon river to Dawson City, and would reach that point on September 15th; and that, in consideration of said promises, libellants each engaged passage from Seattle to Dawson City, and paid therefor $300.00 each for the conveyance of themselves and 1,500 pounds of baggage, and received tickets therefor.

That libellants performed all the conditions of their contract; and that on the 24th day of August, 1897, the Eugene entered upon the performance of her contract, and left Seattle in tow of said steamship Bristol, and undertook to carry libellants and other passengers on the whole of said voyage, and proceeded on the high seas for six hundred miles to the coast of Alaska, where she abandoned the voyage and refused to proceed further, and libellants were landed at Victoria.

That libellants each purchased an outfit at an expense of $200.00, and lost time in which they were hindered from carrying on their business, all to the damage of each of them in the sum of $1,000.00.

To said amended libel claimant answered, denying the various articles of said amended libel and setting up a further defense, as follows:

That prior to the 31st day of July, 1897, Francis B. Jones and Joel P. Geer, being part owners of the steamship Eugene, then belonging to the port of Portland, state and district of Oregon, entered into a contract and agreement with the Portland & Alaska Trading & Transportation Company, in words as follows, to wit:

"This agreement, made this 31st day of July, 1897, by "and between Francis B. Jones and Joel P. Geer, of the "City of Portland, Multnomah county, Oregon, and the "Portland & Alaska Trading & Transportation Company, "of the same place, witnesseth:

"That whereas, the said Francis B. Jones and Joel P. "Geer are desirous of placing the steamer Eugene, now "plying as a passenger boat upon the Willamette river, "upon the Yukon river, in the Territory of Alaska and the "Northwest Territory of Great Britain, adjoining thereto, "for the purpose of running the said boat upon the said "river.

"And whereas, the Portland & Alaska Trading & Trans- "portation Company are desirous of using the said "boat for the purpose of transporting freight up the "Yukon river to Circle City or Dawson.

"Now, therefore, in consideration of the premises, and "the further consideration of one dollar in hand paid the "said Francis B. Jones and Joel P. Geer have, and do "hereby agree to and with the said Portland & Alaska "Trading & Transportation Company, to turn over the "possession of the said steamer Eugene to the said Port- "land & Alaska Trading & Transportation Company for "the purposes aforesaid of taking the same to and up the "Yukon river to such point of the same as the said Port- "land & Alaska Trading & Transportation Company may "desire, and when the said steamer Eugene has arrived at "the terminal point decided upon by the said Portland & "Alaska Trading & Transportation Company, upon the "said river Yukon, and hath discharged her cargo within "a reasonable time and under existing conditions, the said

" Portland & Alaska Trading & Transportation Company
" shall turn over the said steamer to the Willamette &
" Columbia River Towing Company and Joel P. Geer, and
" to there enter a joint traffic interchange between Port-
" land, Or., and Dawson City, Alaska, for the ensuing year,
" on a basis of 40 per cent. to the steamer Eugene and 60
" per cent. to the Portland & Alaska Trading & Transpor-
" tation Company, of through rates, details of which to be
" entered into before sailing from Portland, without
" charge, cost or expense to them. But it is expressly un-
" derstood that the said Portland & Alaska Trading &
" Transportation Company do not hereby agree to transfer
" said steamer safely to the said Yukon, but only to make
" the endeavor to do so, using all proper precaution and
" care in said effort. But if said steamer Eugene shall
" fail to reach the Yukon river or said point of destination
" by reason of any infirmity in the character of the steam-
" er, but without negligence upon the part of the agents
" of the said Portland & Alaska Trading & Transporta-
" tion Company, the latter shall not be responsible in any
" way for the loss of the said steamer or its failure to
" arrive at the proposed terminal destination.

" And the said Portland & Alaska Trading & Transpor-
" tation Company, in consideration of the premises, and
" that the said Francis B. Jones and Joel P. Geer have put
" the said steamer Eugene into their possession for the
" aforesaid purposes, hath and do hereby agree to put the
" said boat, at their own proper cost, charge and expense,
" into such condition as will render it, as far as practica-
" ble, seaworthy and safe to proceed upon the high seas
" to the said Yukon river. The said repairs and renew-

" als necessary to be made to and upon the said steamer
" Eugene to be done at once, and to be satisfactory to the
" said Francis B. Jones and Joel P. Geer before the said
" steamer leaves the City of Portland.

" In testimony whereof, the said Francis B. Jones and
" Joel P. Geer and the Portland & Alaska Trading &
" Transportation Company, by its president, have hereunto
" set their hands and seals, and the seal of the said com-
" pany.

" F. B. JONES.
" JOEL P. GEER.
" H. P. McGUIRE,
" For the Portland & Alaska Trading & Transportation
"Company."

That thereafter, and on the 7th day of August, 1897, the Willamette & Columbia River Towing Company and said Joel P. Geer, the then owners of said steamship Eugene, then lying in the port of Portland, Oregon, and said respondent, the Portland & Alaska Trading & Transportation Company, entered into a contract relative to said steamship Eugene in words as follows, to wit:

" This agreement, made this 7th day of August, 1897, by
" and between Willamette & Columbia River Towing
" Company, a corporation, and Joel P. Geer, of the City of
" Portland, Oregon, and the Portland & Alaska Trading &
" Transportation Company, of the same place, witnesseth:

" That whereas, the said Willamette & Columbia River
" Towing Company and Joel P. Geer are desirous of plac-
" ing the steamer Eugene, now plying as a passenger boat
" upon the Willamette river, upon the Yukon river, in the
" Territory of Alaska and the Northwest Territory of

" Great Britain, adjoining thereto, for the purpose of run-
" ning the said boat upon the said river.

" And whereas, the Portland & Alaska Trading & Trans-
" portation Company are desirous of using the said boat
" for the purpose of transporting freight up the Yukon
" river to Circle City or Dawson City, Northwest Terri-
" tory.

" Now therefore, in consideration of the premises, and
" of the repairs, improvements and money expended by
" the Portland & Alaska Trading & Transportation Com
" pany upon the said steamer Eugene in preparing the
" said steamer for the sea voyage from Portland to St
" Michael's, Alaska, and the further consideration of one
" dollar in hand paid, the said Willamette & Columbia
" River Towing Company and Joel P. Geer have, and do
" hereby agree to and with the said Portland & Alaska
" Trading & Transportation Company, to turn over and do
" hereby turn over the possession of the said steamer
" Eugene to the said Portland & Alaska Trading & Trans-
" portation Company for the purposes aforesaid of taking
" the same to and up the Yukon river to such point of the
" same as the said Portland & Alaska Trading & Trans-
" portation Company may desire, and when the said
" steamer Eugene has arrived at the terminal point decided
" upon by the said Portland & Alaska Trading & Trans-
" portation Company, upon the said river Yukon, and hath
" discharged her cargo, the said Portland & Alaska Trad-
" ing & Transportation Company shall turn over to the
" said Willamette & Columbia River Towing Company
" and Joel P. Geer, without expense to them, so far as
" transporting said steamer Eugene to said Dawson City,

" Alaska. But it is expressly understood that the said
" Portland & Alaska Trading & Transportation Company
" do not hereby agree to transfer said steamer safely to
" the said Yukon, but only to make the endeavor so to do,
" using all proper precaution and care in said effort. But
" if the said steamer Eugene shall fail to reach the Yukon
" river or said point of destination by reason of any infirm-
" ity in the character of the steamer, but without negli-
" gence upon the part of the agents of the said Portland &
" Alaska Trading & Transportation Company, the latter
" shall not be responsible in any way for the loss of the
" said steamer or its failure to arrive at the proposed ter-
" minal destination.

" And the said Portland & Alaska Trading & Transpor-
" tation Company, in consideration of the premises and
" that the said Willamette & Columbia River Towing Com-
" pany and Joel P. Geer have put the said steamer Eugene
" into their possession for the aforesaid purposes, hath and
" do hereby agree to put the said boat, at their own proper
" cost, charge and expense, into such condition as will ren-
" der it, as far as practicable, seaworthy and safe to pro-
" ceed upon the high seas to the said Yukon river. In
" consideration of the money expended by the said Port-
" land & Alaska Trading & Transportation Company in
" the preparation, repairing and improvement of the said
" steamer Eugene at the City of Portland, Oregon, so as
" to make her seaworthy, the Willamette & Columbia
" River Towing Company and Joel P. Geer hereby enter
" into an agreement with and hereby bind themselves to
" give the passengers and freight offered them by the said
" Portland & Alaska Trading & Transportation Company

" at St. Michael's, or any other point agreed upon by them
" at or near the mouth of the said Yukon river, the prefer-
" ence of all other passengers and freight, and hereby enter
" into a joint traffic agreement, for the term of one year
" from the time said steamer Eugene reaches Dawson
" City, with the Portland & Alaska Trading & Transpor-
" tation Company, for the interchange of passengers and
" freight between Portland, Oregon, and Dawson City,
" Northwest Territory, and other points upon the Yukon
" river reached by said steamer Eugene, upon the basis of
" forty (40) per cent. of the gross receipts received from all
" interchangeable passengers and freight to Willamette
" & Columbia River Towing Company and Joel P. Geer,
" and sixty (60) per cent. of said gross receipts to the Port-
" land & Alaska Trading & Transportation Company. The
" feeding and revenue derived from the passengers and
" the expenses of providing for them upon said steamer
" Eugene is not to be included herein.

" In testimony whereof, the said Willamette & Columbia
" River Towing Company and Joel P. Geer, and the Port-
" land & Alaska Trading & Transportation Company, by
" its president, have hereunto set their hands and seals,
" and the seal of the said company.

" WILLAMETTE & COLUMBIA R. & T. Co., [Seal.]
" By F. B. JONES, President. [Seal.]
" WILLAMETTE & COLUMBIA RIVER TOWING
" COMPANY, by JOEL P. GEER. [Seal.]
" M. S. JONES, Secretary.
" PORTLAND & ALASKA TRADING & TRANSPOR-
" TATION COMPANY, by W. W. McGUIRE,
" Secretary.

"[Seal.] Seal of Portland & Alaska Trading & Trans-
"portation Company.

"[Seal.] Seal of Willamette & Columbia River Tow-
"ing Company.

"In the presence of:

"ALEXANDER SWEEK.

"E. B. McFARLAND."

That in pursuance of said contracts and in conformity therewith, said owners of said steamship Eugene turned the possession of her over unto the said Portland & Alaska Trading & Transportation Company for the purposes thereof, and not otherwise, and said Portland & Alaska Trading & Transportation Company proceeded to refit said steamer Eugene in accordance with the provisions of said contracts.

That the said Eugene was not an ocean-going vessel, but a light-draught river steamboat then plying upon the waters of the Willamette river, in the State of Oregon, and was well known as such both at Portland and Seattle; and that her use upon the seas or any use as carrier of freight, passengers or baggage was never contemplated between her owners and the said Portland & Alaska Trading & Transportation Company; that the delivery of said steamboat Eugene by her said owners to said Portland & Alaska Trading & Transportation Company, of Portland, Oregon, was in accordance with said contracts and not otherwise, and for the purpose of fitting up said vessel and taking the same from Portland, Oregon, to St. Michael's, Alaska, between which said latter point and Dawson City the owners of the Eugene and said Portland & Alaska Trading & Transportation Company desired and agreed to operate

said boat; that thereafter, and before the departure of said boat from Portland, Oregon, the Yukon Transportation Company, of Portland, Oregon, a corporation organized and existing under the laws of the State of Oregon, became, by purchase from said Willamette & Columbia River Towing Company and said Joel P. Geer, the owner of said steamship Eugene, and is the owner thereof; and that claimant was master and bailee thereof on behalf of said owners.

That thereafter said steamboat Eugene, by her own power, proceeded from Portland to Astoria, Oregon, and from said latter point was towed by the tugboat Escort to Port Angeles, Washington, and from said last named point proceeded with her own power to Comox, British Columbia, and at or about said last named point was taken in tow by the steamship Bristol, such towage being for the purposes mentioned in the said contracts of July 31, 1897, and August 7, 1897, and not otherwise; that when said steamboat Eugene had proceeded as aforesaid a distance of 600 or 700 miles from Comox, British Columbia, heavy weather was encountered, and said steamboat Eugene began to strain heavily and spring leaks, and was compelled to and did return to Port Townsend, Washington, and thence proceeded to Seattle, Washington, for repairs, at which said latter point she was lying at the time of her attachment at the instance of libellants; that the libellants purchased from F. C. Davidge & Co., at Seattle, Washington, passage upon the steamship Bristol from Victoria, B. C., to St. Michael's, Alaska, thence operated by F. C. Davidge & Co. under time charter, and thereafter embarked upon said steamship Bristol, together with their freight and baggage, and at the same time purchased from the Port-

land & Alaska Trading & Transportation Company a ticket from St. Michael's, Alaska, to Dawson City, N. W. T., which this claimant was informed and believes, and therefore alleged, read as follows:

"No. 6.

"Portland & Alaska Trading & Transportation Co.

"Good for one passage from St. Michael's to Dawson "City, N. W. T., via S. S. Eugene. Name, Gaston Jacobi "(Charles Ruff). E. B. McFARLAND, Manager."

That neither of said libellants, nor their baggage or freight, was ever on board the steamer Eugene; that the voyage of said vessel contemplated under said contract evidenced by said ticket was to begin at St. Michael's, Alaska, and end at Dawson City, N. W. T.; that neither of said libellants nor said steamboat Eugene ever arrived at St. Michael's, and that said contract was wholly executory.

That by reason of the fact that the steamboat Eugene was not a seagoing vessel, and was commonly and generally known as such, neither said Portland & Alaska Trading & Transportation Company, nor the owners of said steamboat Eugene, nor claimant, ever promised or agreed that said vessel could in fact undergo the trip to St. Michael's and there place herself in readiness to proceed up the Yukon river, and from St. Michael's to Dawson City; that no absolute representations or warranty that she would arrive at St. Michael's on or before September 15, 1897, or at any other time, were made by said Portland & Alaska Trading & Transportation Company to libellants, but only that an attempt would be made to bring her to said point; and that said attempt was so made, and by stress of

weather said boat was unable to proceed to St. Michael's and was obliged to abandon the attempt and return to Port Townsend.

That libellants, prior to the institution of this suit, released said steamer Bristol and said F. C. Davidge & Co. from their contract with libellants for the conveyance of libellants from Victoria to St. Michael's; that the conveyance of libellants contemplated under said ticket on the steamboat Eugene was from St. Michael's to Dawson City, and not otherwise; that neither of the said libellants, nor said steamer Eugene, ever arrived at the port of St. Michael's, at which point said voyage was to commence; and that no part of the passage money alleged as paid was ever paid to or received by the Yukon Transportation Company, of Portland, Oregon, owner of the Eugene, or claimant, as her manager.

And claimant prayed that said libel be dismissed.

Thereafter, Walter M. Cary, Fred M. Lyons and Edward J. Knight served upon claimant's proctors a paper purporting to be a copy of a libel of intervention, filed in said court by said persons, claiming the same relief upon the same alleged state of facts against the Eugene. *No such libel of intervention, nor any stipulation of costs, was ever filed in the district court.*

Testimony was taken before a commissioner, and the decree appealed from was thereafter rendered by the district court in favor of libellants and said alleged intervenors, each in the principal sum of $800.00.

The facts disclosed by the evidence are substantially as set forth in the answer of the claimant to the amended

libel. The Eugene was placed by her owner in the possession of the Portland & Alaska Trading & Transportation Company for the purposes of the contracts above set forth, and the only interest that corporation had in the steamboat was such special interest as it acquired under these contracts. Arrangements were made between the Portland & Alaska Trading & Transportation Company and F. C. Davidge & Co., who operated the British steamship Bristol, under a time charter, to carry not less than one hundred and fifty nor more than two hundred people from Seattle to St. Michael's, at one hundred dollars each, and that the Bristol should act as convoy for the Eugene from Comox to St. Michael's; the Eugene to be under her own power, and subject to the orders of the master of the Bristol, as to course, etc. For this service Davidge & Co. were to receive $200 per day.

H. P. McGuire, for the Alaska Company, and Davidge, then went to Seattle and opened a joint office, in charge of C. W. Gould, and libellants there paid to Mr. Gould three hundred dollars each, for which they each received a ticket from Seattle to Victoria on the steamboat City of Kingston, an order on Davidge & Co., Victoria, for a ticket on the Bristol from Victoria to St. Michael's (exchanged at Victoria for the ticket good on the Bristol), and a ticket good on the Eugene from St. Michael's to Dawson City, which read:

"Portland & Alaska Trading & Transportation Com-
"pany.

"Good for one passage from St. Michael's to Dawson
"City, N. W. T., via S. S. Eugene. (Name of passenger.)

"E. B. McFARLAND, Manager."

Neither the Eugene nor the Bristol was then in Seattle, the Eugene being at Port Angeles, Washington, and the Bristol on her way from Alaska to Victoria. Libellants and the other Seattle passengers, on different days, delivered their outfits to the wharfinger at the dock which was the landing place of the City of Kingston at Seattle, marking them, for identification, "S. S. Eugene," and embarked on the City of Kingston for Victoria. After a delay of two or three days at Victoria, awaiting the arrival of the Bristol, they embarked on the Bristol, which thereupon started, and when a short distance out was met by the Eugene, which had steamed over from Port Townsend. A line was passed from the Bristol to the Eugene, and the two vessels proceeded to Comox, the coaling port of the Bristol, the Eugene being under her own power. At Comox, while the Bristol was coaling, the baggage of the *crew of the Eugene*, for safety, was placed on board the Bristol; and the revenue authorities threatening to seize the Eugene on this account, the Eugene herself proceeded to sea, and, after proceeding about forty miles, was overtaken by the Bristol, and a line was again passed to the Eugene. The two vessels then proceeded together through Queen Charlotte's Sound; and then, in the face of a summer storm, the Bristol towed the Eugene into the open sea, refusing to proceed by the inside passage, being without a pilot for that route. The storm increased, and the truss on the Eugene began to strain and work. The strain upon other parts of the vessel was apparent, and she was taking in water through her seams. Captain Lewis, of the Eugene, at the solicitation of her crew, signalled the Bristol to put back into Alert bay. This was

done, and while there the Eugene was surveyed by a committee and pronounced unfit in her condition to proceed to St. Michael's. The passengers, including libellants, thereupon insisted upon returning to Victoria, and released the Bristol from its obligation to carry them to St. Michael's. The Eugene proceeded to Seattle, and while undergoing repairs was arrested at the suit of libellants. *Neither libellants nor their outfits were ever on board the Eugene as passengers or freight. The Eugene was not in Seattle when libellants purchased their tickets, and was never in Seattle at all until after the expedition was broken up and she went there for repairs.*

ASSIGNMENT OF ERRORS.

It is alleged and intended to be urged upon this appeal that the decree of the district court is erroneous in the following particulars:

1. In decreeing any damages to libellants or any of them by reason of the matters disclosed in the pleadings or proofs.

2. In holding that libellants or any of them contracted with the Eugene for a continuous voyage from Seattle to Dawson City.

3. In holding that the Eugene had entered upon the performanace of such continuous voyage.

4. In holding that an action in rem lay against the Eugene by reason of the matters pleaded or proved.

5. In not holding that the Portland & Alaska Trading & Transportation Company was owner only for the purpose of contracting for the carriage of passengers or freight upon the Yukon river, and had no right or power to bind the Eugene further than to contract for a voyage

up the Yukon river, and this only in the event of the safe arrival of the Eugene at St. Michael's.

6. In not holding that any contract on the part of the Eugene was executory only.

7. In decreeing excessive damages, $400 of the award in each instance being for loss of time and expected profits, the same being too remote and speculative to furnish any basis for a recovery.

8. In not holding that the return of the Eugene was under circumstances such as to discharge her from obligation or liability to libellants.

9. In not holding that any contract on the part of the Eugene was executory, and that said vessel had not entered upon the performance thereof.

10. In not holding that libellants contracted with the Portland & Alaska Trading & Transportation Company, relying upon its personal credit, and not upon the credit of the Eugene.

11. In decreeing for said alleged intervenors, Cary, Lyons and Knight, for all and singular the above errors specified.

12. That said district court had no jurisdiction to render such decree as to said alleged intervenors.

13. In decreeing that any stipulation filed by claimant authorizes said or any such decree.

ARGUMENT.

The propositions of law and fact for which we shall contend are:

1. That the Portland & Alaska Trading & Transportation Company, with whom alone libellants dealt, had not

power to bind the Eugene in specie by any such contract as is alleged was made.

2. That libellants contracted for a voyage on the Eugene from St. Michael's to Dawson City only, such voyage to begin at St. Michael's and to end at Dawson City; and that as neither the Eugene nor libellants reached St. Michael's, and no part of the outfit of libellants was received on board the Eugene, such contract was executory only, and was insufficient to sustain a proceeding in rem against the Eugene, she having never entered upon the performance of such contract.

3. That the circumstances under which the Eugene abandoned the voyage were such as to discharge her from any liability which she might otherwise have incurred.

4. That the contract was entered into by libellants with the Portland & Alaska Trading & Transportation Company, in reliance upon the personal credit and responsibility of that corporation, and not upon the faith or credit of the Eugene; and that inasmuch as the Eugene was not at Seattle until about the time of the filing of the libel itself, and no dealings were ever had between libellants and the owner of the Eugene, or her master as representative of her owner, no basis for a suit in rem existed.

6. That excessive damages were awarded to libellants.

7. As to the alleged intervenors, Cary, Lyons and Knight, in addition to all the foregoing points, we shall urge that the district court had no jurisdiction to render its decree as to such alleged intervenors, and that the same is a nullity.

8. The stipulation referred to in the decree does not authorize any decree in favor of said alleged intervenors.

These points we shall discuss in the order named above.

I.

The owner of the Eugene at the time of the dealings had between libellants and the Portland & Alaska Trading & Transportation Company was the Yukon Transportation Company, of Portland, Oregon, and neither this corporation nor the former owners of the vessel, Jones and Geer, ever had any dealings with libellants or received any part of the passage money. Whether the Portland & Alaska Trading & Transportation Company had any such special ownership as would authorize it to bind the vessel by a contract with libellant, can only be ascertained by an interpretation of the contracts under which alone the Portland & Alaska Trading & Transportation Company held the vessel. These contracts are set forth in full on pages 4 and 7 of this brief, and also in the answer to the amended libel (Record, page 86). The first contract contains the following recitals and agreements:

"Whereas, the said Francis B. Jones and Joel P. Geer "are desirous of placing the steamer Eugene, now plying "as a passenger boat upon the Willamette river, upon "the Yukon river, in the Territory of Alaska and the "Northwest Territory of Great Britain, adjoining thereto, "for the purpose of running the said boat upon the said "river; and whereas, *the Portland & Alaska Trading &* "*Transportation Company are desirous of using the said* "*boat for the purpose of transporting freight up the* "*Yukon river to Circle City or Dawson.* Now therefore, "in consideration of the premises, and the further con-"sideration of one dollar in hand paid, the said Francis B. "Jones and Joel P. Geer have and do hereby agree to and "with the said Portland & Alaska Trading & Transporta-

"tion Company to turn over the possession of the said
"steamer Eugene to the said Portland & Alaska Trading
"& Transportation Company, for the purposes aforesaid
"of taking the same to and up the Yukon river to such
"point of the same as the said Portland & Alaska Trading
"& Transportation Company may desire, and when the
"said steamer Eugene has arrived at the terminal point
"decided upon by the said Portland & Alaska Trading &
"Transportation Company, upon the said river Yukon, and
"hath discharged her cargo within a reasonable time
"under existing conditions, the said Portland & Alaska
"Trading & Transportation Company shall turn over the
"said steamer to the Willamette & Columbia River Tow-
"ing Company and Joel P. Geer, and to there enter a
"joint interchange of traffic between Portland, Or.," etc.

The provisions of the contract of August 7, 1897, are substantially the same in the above particulars.

The only interest of the Portland & Alaska Trading & Transportation Company in the Eugene was its interest under these contracts; and its possession of the boat was the possession under these contracts, and not otherwise, and was subject to the limitations of the contracts. Captain Jones, one of the former owners, and president of the Yukon Transportation Company, the then owner, states in answer to an interrogatory (Transcript, p. 309; Record, p. 259): "They were not to use the boat from Port-
"land to St. Michael's for any purpose. She was put into
"their possession at Portland for the purpose of fitting
"her up and taking her up to St. Michael's, where they
"were to have the use of the boat from St. Michael's to
"Dawson City, and for having the use of the boat from
"St. Michael's to Dawson City they were to go to the

"expense of fitting her up for a sea voyage and taking
"her to St. Michael's free of all costs as far as they were
"concerned."

Captain Geer, claimant, and one of the former owners, testifies (Transcript, p. 280; Record, p. 236): "The boat was "not to be used on the open sea—never had passengers or "freight on board." And, as Captain Jones (Transcript, p. 379; Record, p. 292) testifies: "In the first place, the "McGuires (the Portland & Alaska Trading & Transpor-"tation Company) were to tow her (the Eugene) with a "tug." The Eugene was not in Seattle when the libellants purchased their tickets, and in the purchase they dealt neither with her owner nor her master.

We admit that, where a charter-party amounts to a demise of the vessel, contracts of affreightment or for the carriage of passengers upon the performance of which the vessel enters, and claims for supplies actually furnished in a foreign port, bind the vessel; but in the one case it is the entry upon performance, and in the other the use of the supplies, which creates the lien. In this case, however, libellants did not deal with the vessel, which was then hundreds of miles away, but with the Portland & Alaska Trading & Transportation Company, *having satisfied themselves upon inquiries that the corporation with which they were dealing was a business concern of responsibility, upon which they might rely.* Jacobi (Transcript, p. 159; Record, p. 137) says that Kleine & Rosenberg, the outfitters in Seattle, told him that the Portland & Alaska Trading & Transportation Company was all right, and Ruff testifies (Transcript, p. ; Record, p. 61) that Thedinga & Co. told him that the Portland & Alaska Trading

& Transportation Company were business people and would do things in a business way.

Under these circumstances, we submit that the Eugene could be held by libellants only to contracts which the Portland & Alaska Trading & Transportation Company might lawfully make with reference to her, under the contracts by virtue of which it had possession of the vessel; and, further, that the Eugene must have entered upon the performance of the contract so lawfully made.

Libellants were not dealing with the vessel itself through the apparent owner, but were contracting with the Portland & Alaska Trading & Transportation Company on the faith of the credit and responsibility of that corporation, in reference to a vessel which they never saw, and which was hundreds of miles away from the place in which the contract was entered into. They were dealing neither with the owner nor the master of the Eugene, and no part of their passage-money was going to that vessel.

The language of Mr. Justice Brown in the case of The T. A. Goddard, 12 Fed. Rep. 174, 181, we consider particularly applicable to this case. On page 181 he says: "The " libellants, having no direct agreement with the master of " the T. A. Goddard, are doubtless limited in their recov- " ery by the lawful terms of the contract between Russell " & Co. (the charterers) and the bark."

The evidence in this case is clear and undisputed that the Portland & Alaska Trading & Transportation Company had no right to use the Eugene for the purpose of carrying freight upon the high seas, or to contract for the carriage of any freight or passengers upon her, except for a trip up the Yukon river, beginning at St. Michael's and

ending at Dawson City. Hence the Eugene could not be bound by any contract for a voyage from Seattle to Dawson City entered into between the Portland & Alaska Trading & Transportation Company and libellants, she herself not being at Seattle, and libellants having contracted with the Portland & Alaska Trading & Transportation Company upon the personal credit of that corporation.

II.

The contract as to the Eugene was an executory one, and as neither that vessel nor libellants ever arrived at St. Michael's, the port at which the Eugene was to receive on board the passengers and freight for her trip up the Yukon river, and no part of the outfit of libellants was ever received on board the Eugene, no action in rem lies against the vessel, she herself never having entered upon the performance of the contract.

The Schooner Freeman v. Buckingham, 18 How. 188.
Vandewater v. Mills, 19 How. 82.
The Lady Franklin, 8 Wallace, 325.
The Keokuk, 9 Wallace, 517.
Scott v. The Ira Chaffee, 2 Fed. Rep. 401.
The General Sheridan, 2 Benedict, 299.
The Monte A., 12 Fed. Rep. 331.
The Eugene, 83 Fed. Rep. 222.

The opinion of Justice Greer, in the case of Vandewater v. Mills, 19 Howard, 82, clearly defines the limitations of maritime liens for the carriage of freight or passengers. It is there held that "maritime liens are stricti juris, and " will not be extended by construction. Contracts for the " future employment of a vessel do not, by the maritime " law, hypothecate the vessel. The obligation between

"ship and cargo is mutual and reciprocal, and does not "take place till the cargo is on board." In that case, the owners of two vessels entered into an agreement for the establishment of a through line from New York to San Francisco, via the isthmus of Panama, one of the vessels to run from New York to Aspinwall, and the other from Panama to San Francisco, the freight and passenger money to be pro-rated; and it was agreed that the vessels should leave San Francisco and New York at a certain time. The steamer Yankee Blade was libelled for breach of the contract, and exceptions were interposed by her owner on the ground that no proceding in rem lay against her. Justice Greer, on page 89, says:

"The circuit court dismissed the libel, being of opinion "'that the instrument is of a description unknown to the "'maritime law; that it contains no express hypothecation "'of the vessel, and the law does not imply one.'

"In support of his allegation of error in this decree, the "learned counsel for the appellant has endeavored to "establish the following proposition:

"'Agreements for carrying passengers are maritime "'contracts, pertaining exclusively to the business of com- "'merce and navigation, and consequently may be "'enforced specifically against the vessel by courts of "'admiralty proceeding in rem.'

"Assuming, for the present, the premises of this propo- "sition to be true, let us inquire whether the conclusion is "a legitimate consequence therefrom.

"The maritime 'privilege' or lien is adopted from the "civil law, and imports a tacit hypothecation of the sub- "ject of it. It is a 'jus in re,' without actual possession

" or any right of possession. It accompanies the property
" into the hands of a bona fide purchaser. It can be exe-
" cuted and divested only by a proceeding in rem. This
" sort of proceeding against personal property is unknown
" to the common law, and is peculiar to the process of
" courts of admiralty. The foreign and other attachments
" of property in the state courts, though by analogy loosely
" termed proceedings in rem, are evidently not within the
" category. But this privilege or lien, though adhering to
" the vessel, is a secret one; it may operate to the prejudice
" of general creditors and purchasers without notice; it is
" therefore '*stricti juris*,' and cannot be extended by con-
" struction, analogy or inference. 'Analogy,' says Par-
" dessus (Droit Civ., Vol. 3, 597), 'cannot afford a decisive
" ' argument, because privileges are of strict right. They
" ' are an exception to the rule by which all creditors have
" ' equal rights in the property of their debtor, and an
" ' exception should be declared and described in express
" ' words; we cannot arrive at it by reasoning from one
" ' case to another.'

" These principles will be found stated, and fully vindi-
" cated by authority, in the cases of The Young Mechanic,
" 2 Curtis, 404, and the Kiersarge, ibid, 421; see also Har-
" mer v. Bell, 22 E. L. & E. 62.

" *Now, it is a doctrine not to be found in any treatise on*
" *maritime law, that every contract by the owner or master*
" *of a vessel, for the future employment of it, hypothecates*
" *the vessel for its performance.* This lien or privilege is
" founded on the rule of maritime law as stated by Cleirac
" (597), 'Le batel est oblige a la marchandise et la mar-
" ' chandise au batel.' The obligation is mutual and recip-
" rocal. The merchandise is bound or hypothecated to the

"vessel for freight and charges (unless released by the "covenants of the charter party), and the vessel to the "cargo. The bill of lading usually sets forth the terms of "the contract, and shows the duty assumed by the vessel. "Where there is a charter-party, its covenants will define "the duties imposed on the ship. Hence it is said (1 "Valin, Ordon. de Mar., B. 3, Tit. 1, Art. 11), that 'the ship, "'with her tackle, the freight, and the cargo, are respect- "'ively bound (affectee) by the covenants of the charter- "'party.' But this duty of the vessel, to the performance "of which the law binds her by hypothecation, is to deliver "the cargo at the time and place stipulated in the bill of "lading or charter-party, without injury or deterioration. "If the cargo be not placed on board, it is not bound to "the vessel, and the vessel cannot be in default for the "non-delivery, in good order, of goods never received on "board. *Consequently, if the owner or master refuses* "*to perform his contract, or for any other reason the ship* "*does not receive cargo and depart on her voyage accord-* "*ing to the contract, the charterer has no privilege or* "*maritime lien on the ship for such breach of contract by* "*the owners, but must resort to his personal action for* "*damages, as in other cases.*"

And on page 91:

"We have examined this case from this point of view, "because the libel seems to take it for granted that every "breach of contract where the subject-matter is a ship "employed in navigating the ocean gives a privilege or "lien on the vessel for the damages consequent thereon, "and because it was assumed in the argument that, if this "contract was in the nature of a charter-party, or had "some features of a charter-party, the court would extend

"the maritime lien by analogy or inference, for the sake "of giving the libellant this remedy, and sustaining our "jurisdiction. But we have shown this conclusion is not "a correct inference from the premises, and that *this lien,* "*being stricti juris, will not be extended by construction.* "It is, moreover, abundantly evident that this contract has "none of the features of a charter-party. A charter-party "is defined to be a contract by which an entire ship, or "some principal part thereof, is let to a merchant for the "conveyance of goods on a determined voyage to one or "more places. (Abbott on Ship., 241.)"

In the case of the Schooner Freeman, 18 Howard, 188, Justice Curtis says: "Under the maritime law of the "United States the vessel is bound to the cargo, and the "cargo to the vessel, for the performance of a contract of "affreightment; but the law creates no lien on a vessel as "a security for the performance of a contract to transport "cargo, until some lawful contract of affreightment is "made, *and a cargo shipped under it.*"

And Justice Davis, in the case of The Lady Franklin, 8 Wall. 328, says: "The attempt made, in the prosecution "of this libel, to charge this vessel for the non-delivery of a "cargo, which she never received, and therefore could not "deliver, because of a false bill of lading, cannot be suc-"cessful, and we are somewhat surprised that the point is "pressed here. * * * The doctrine that the obligation "between ship and cargo is mutual and reciprocal, and does "not attach until the cargo is on board, or in the custody of "the master, has been so often discussed and so long settled "that it would be useless labor to restate it, or the princi-"ples which lie at its foundation. The case of The Schooner "Freeman v. Buckingham, decided by this court, is deci-

"sive of this case. It is true the bill of lading there was "obtained fraudulently, while here it was given by mistake; "but the principle is the same, and the court held in that "case that there could be no lien, notwithstanding the bill "of lading."

And the same court, in the case of The Keokuk, 9 Wall. 517, holds that "the law creates no lien on a vessel as "security for the performance of a contract to transport "a cargo, unless some contract of affreightment has been "made." Justice Davis, on page 519, says: "It is a prin-"ciple of law that the owner of the cargo has a lien on the "vessel for any injury he may sustain by the fault of the "vessel or the master; but the law creates no lien on a "vessel as security for the performance of a contract to "transport a cargo until some lawful contract of affreight-"ment is made, *and the cargo to which it relates has been* "*delivered to the custody of the master or some one* "*authorized to receive it.*"

And the same court, in the case of The Delaware, 14 Wall. 602, says: "But it is well-settled law that the own-"ers are not liable, if the party to whom the bill of lading "was given had no goods, or the goods described in the bill "of lading were never put on board or delivered into the "custody of the carrier or his agent."

In the case of The Schooner General Sheridan, 2 Benedict, 294, the facts were that the schooner General Sheridan was chartered by one Faber for a voyage from one or more of several named places of loading on the west coast of Florida to New York. Faber afterwards filed his libel against the vessel in rem, alleging a breach of the charter, in that the vessel did not, as she was required to do, proceed to any of the ports of loading mentioned in the char-

ter-party, or give notice of her readiness to receive cargo, or take any cargo, but returned to New York without having fulfilled any of the stipulations of the charter-party. He claimed damages for the alleged breach. The claimants excepted to the libel, on the ground that the facts set forth in it did not constitute any lien on the vessel. Upon these facts, Justice Blatchford held that the case of The Pacific, 1 Blatchford, 569, had been overruled by the cases of The Schooner Freeman v. Buckingham, 18 How. 182, and Vandewater v. Mills, 19 How. 82; and (on page 297) said: "The obligations of the vessel to the mer-"chandise to be laden on board, and of the merchan-"dise to be laden on board to the vessel, are mutual and "reciprocal. Under the covenant, the duty of the vessel, "to the performance of which the hypothecation binds "her, is to deliver the cargo that may be put on board at "the time and place stipulated for such delivery. *Any "duty that may be violated by the owner or master, "before the cargo is put on board, is not a duty of the "vessel, or one for the breach of which a lien on the vessel "is created or can be enforced.* So, too, under the cove-"nant, if the cargo is not laden on board, it is not bound "to the vessel, and therefore the *vessel* cannot be in "default, though the *master or owner may be*, for the non-"delivery of the cargo. To hold that the vessel was bound "to the merchandise to be laden on board, when there was "no merchandise laden on board, would be to depart from "the express terms of the covenant, and to destroy the "mutual and reciprocal character of the obligations of "the covenant. * * * The exceptions are allowed, and "the libel is dismissed, with costs."

In Scott v. The Ira Chaffee, 2 Fed. Rep. 401, a libel in rem was filed to recover damages for breach of a contract by the master to carry a boiler from Detroit to Oscoda. The boiler was never actually put on board the propeller, nor delivered to *her master, as master, although he received it on behalf of the schooner Louisa, on which it was laden and carried to Oscoda.* The Louisa was caught in the ice and detained, whereby the arrival of the boiler was delayed. The libellant claimed damages for detention. Justice Brown, now of the United States Supreme Court, on page 407, after reviewing the authorities, says: " From this review of the cases it will be seen that, with " the exception of the dictum in the case of the Williams, " there is no authority for saying that a court of admiralty " has jurisdiction in rem for the breach of a purely execu- " tory contract. There is reason as well as authority for " the proposition. If the owner of a cargo has a privilege " upon the vessel for a breach of his contract, the vessel " would be entitled equally to a lien on the cargo for a " refusal of the owner to put it on board, and it might be " seized upon the dock or anywhere else for the satisfac- " tion of such lien. If the jurisdiction is sustained in this " class of cases, it ought also to include cases of contract " to repair the vessel or supply her with stores, in which " the material-man would be entitled to a lien, though " nothing had been done under the contract."

In the case of The Monte A., 12 Fed. Rep. 331, Justice Brown says: " The action in this case is brought for the " breach of a contract of charter-party wholly executory. " The vessel never entered upon the performance of the " contract or any part of it. In such cases it has been " repeatedly declared by the Supreme Court that no lien

"exists upon the vessel. * * * The considerations in "favor of such a lien, expressed in the cases of The Flash, "Abb. Adm. 67, and The Pacific, 1 Blatchf. 569, must be "deemed overruled by these subsequent decisions. There "being, therefore, no lien upon the vessel, there is no "foundation for a decree in rem against her."

And in the case now under consideration, in an opinion upon exceptions to the original libel (83 Fed. Rep. 222), Judge Hanford holds that a suit in rem is not maintainable for breach of an executory contract to carry a passenger on a particular vessel, where the vessel has never entered on the performance thereof. "*The lien upon "which the right to proceed in rem depends does not "attach until the passenger has placed himself within the "care and under the control of the master.*" And on page 224 he says: "These authorities are conclusive upon the "point that the right to proceed in rem for breach of a "contract of affreightment does not exist unless the cargo, "or a portion of it, has been delivered to the master of the "vessel, or to his authorized agent. The authorities also "hold that ships engaged in carrying passengers on the "high seas stand on the same footing of responsibility, "according to the maritime laws, as those engaged in "carrying merchandise. 1 Am. & Eng. Enc. Law (2d Ed.), "pp. 661, 662. * * * *According to the authorities, it "is not the making of a contract, nor the payment of the "consideration therefor, which renders the vessel liable. "The lien upon which the right to proceed in rem depends "does not attach until the goods or passengers have been "placed within the care and under the control of the "ship's master.*"

In this case, the Eugene had never entered upon the performance of her contract, and neither the libellants nor their baggage or freight had been received on board as passengers or freight, and neither the libellants nor the Eugene had arrived at St. Michael's, the point at which the voyage of the vessel was to begin.

The testimony was taken before a commissioner, and not in open court, and the statement in the decree that the material allegations of the amended libel are true cannot be considered by this court; but this court must itself review the testimony upon these questions. Glendale v. Evich, 81 Fed. Rep. 633.

It is true that the Eugene started for St. Michael's, with the intention, if she arrived there, of there performing the contract under which the Portland & Alaska Trading & Transportation Company had agreed to carry libellants as passengers on said vessel. To reconcile the decision of the district court on the exceptions with its decision on the case, we must conclude that the court decided that the Eugene entered upon the performance of her contract when she started for St. Michael's under tow, with no passengers or baggage aboard her, and uncertain by the terms of her charter whether she would ever arrive at St. Michael's, where her own employment was to begin. Such a sailing, with the intention to perform the contract, is insufficient, however, to sustain a proceeding in rem against the vessel.

As Judge Brown, in the case of The C. E. Conrad, 57 Fed. Rep. 256, says: "I doubt whether merely proceeding "to Rochester with the intention of taking the libellant's "salt, and on arrival there going elsewhere for a different

"cargo, would constitute such an entry *on the perform-* "*ance of the contract, as would bring the case within the* "*rule of a partial execution of the charter, sufficient to* "*sustain a libel in rem for the breach of the contract.*"

Libellants maintained that they had contracted for a continuous voyage which had commenced, and claimed in the libel that the Eugene had started from Seattle upon the voyage in tow of the Bristol. Such, however, is not the case, as is shown by the testimony. Libellants paid $300 to C. W. Gould, acting as joint agent for Davidge & Co., charterers of the Bristol, and the Portland & Alaska Trading & Transportation Company, and received therefor a local ticket on a third vessel from Seattle to Victoria, an order on Davidge & Co., at Victoria, for a ticket on the Bristol to St. Michael's, which they exchanged at Victoria for the ticket, and a ticket good for one passage from St. Michael's to Dawson City via the Eugene, signed by E. B. McFarland as general manager.

Libellants have their action in personam against the Portland & Alaska Trading & Transportation Company for any failure on its part to land libellants in Dawson City as agreed; *but the liability of the Eugene is limited to breaches of its particular part of the contract.* For example, had the Eugene arrived at St. Michael's and there received on board the libellants as passengers, or part of their outfit as freight, and then refused to proceed, or committed other breaches of its then existing obligation, an action in rem would lie against the vessel. The Eugene did not start from Seattle in tow of the Bristol; she proceeded from Port Townsend to another port, Victoria. Libellants proceeded to Victoria on the City of Kingston, and there embarked on the Bristol, which latter vessel,

outside of Victoria. fastened a tow-line to the Eugene. The tow-line could not make the Bristol and the Eugene one vessel, so as to make the passengers on the Bristol passengers on the Eugene.

The J. P. Donaldson, 167 U. S. Sup. Ct. Rep. 599, is a valuable authority upon the relations between tug and tow. In that case, the propeller. J. P. Donaldson was engaged in the towage of two barges laden with grain, and for its services as a tug was to receive a proportion of the freight money to be earned by the barges. A storm coming up, the tug, in order to save herself, cut loose from the barges, which were lost, and the owners of the cargo on the barges libelled the tug to recover a general average contribution from her, claiming that the tug and tow were bound up into a single maritime adventure. The court, however, held that such a contention was unsound, and dismissed the libel. On page 602 the court say:

"While the tug is performing her contract of towing the " barges, they may, indeed, be regarded as part of herself, " in the sense that her master is bound to use due care to " provide for their safety as well as her own, and to avoid " collision, either of them or of herself, with other vessels. " * * * * But the barges in tow are by no means put " under the control of the master of the tug to the same " extent as the *tug herself, and cargo, if any, on board of* " *her*. And on page 604: *It is solely for the purpose* " *of performing the contract of towage that the vessels* " *towed are put under the control and management of the* " *master of the tug*. In all other respects, and for all other " purposes, they remain under the control of their respect- " ive masters; and, in case of unforeseen emergency, it is " upon the master of each that the duty rests of determin-

"ing what shall be done for the safety of his vessel and of "her cargo. * * * *The fact that the sum to be paid "to the tug for towing each barge was measured by a "certain proportion of the freight to be earned by that "barge is immaterial. It did not create a partnership "between the owners of the tug and the owners of the "barges.* Meehan v. Valentine, 145 U. S. 611, 12 Sup. "Ct. 972. *Nor could it have the effect of combining the "tug and the barges into a single maritime adventure, "within the scope of the law of general average.* For the "reasons above stated, this court concurs in the opinion "expressed in this case by Mr. Justice Brown, when dis-"trict judge, that 'the law of general average is confined "'to those cases wherein a voluntary sacrifice is made of "'some portion of the ship or cargo for the benefit of the "'residue, and that it has no application to the contract "'of towage.' 19 Fed. 272."

The position of the Eugene, as an independent vessel, is far stronger than the position of the barges with reference to the Donaldson. The Eugene proceeded by her own power from Port Townsend to Victoria, and for a large portion of the voyage from Victoria to the point at which the voyage was abandoned proceeded independently of the Bristol. Under the contract entered into between the Portland & Alaska Trading & Transportation Company and Davidge & Co. (Transcript, p. ; Record, p. 96) the Eugene was to furnish her own motive power, and the Bristol was to act as her convoy, and receive a stipulated sum per day for her services as such. The use of the Bristol for the purpose of a convoy for the Eugene was an incident only, and was for the purpose of better enabling the Eugene to arrive at St. Michael's. The Eugene might equally as

well have employed some other sea-going tug as convoy; and, as Capt. Jones testifies, such was the original intention.

It was contended by libellants in the District Court that the delivery of their outfit to the wharfinger at the Yesler dock at Seattle was such a delivery to the Eugene as to bind the vessel in rem. But the Eugene never was in Seattle, nor was her master there; and she was not to receive the outfit as freight or baggage *until she arrived at St. Michaels, 2000 miles distant from Seattle.* The delivery was made neither to the master of the vessel nor to any one authorized by the master to receive it, on behalf of the vessel, in such a way as to bind the vessel; nor was any bill of lading or receipt given in the name or in behalf of the Eugene. The carriage of the outfit was to be on the City of Kingston to Victoria, on the Bristol from Victoria to St. Michael's, and on the Eugene from St. Michael's to Dawson City; and the delivery was made at the landing place of the City of Kingston in Seattle, to the man in charge of the dock as representative of the City of Kingston. *Such a delivery might be sufficient to sustain an action in personam against the Portland & Alaska Trading & Transportation Company, but not an action in rem against the Eugene.*

In the case of Ammon v. The Vigilancia, 58 Fed. Rep. 698, Justice Brown holds that there can be no delivery to the ship, in the maritime sense, either of supplies or cargo, so as to bind her in rem, until the *goods are either actually put on board the ship, or else brought within the immediate presence or control of her officers.* In that case, the ship lay at Jersey City, and the goods were delivered to a truckman in New York, a mile or so away; and it was

contended that delivery to the truckman was a delivery to the ship. The court, on page 700, says: "Had the "goods in question been lost while in transit from Jersey "City to Roberts's Stores, where the ship lay, the steam- "ship company might possibly have been personally liable "for the goods; but plainly no lien for them could have "arisen against the ship, *because they would never have* "*come to the benefit of the ship.* * * * No lien, there- "fore, arose when the goods were delivered to the truck- "man in Jersey City, *since the ship had not received* "*the goods, and might never receive them. Something* "*more had to be done, viz., to deliver them to the ship.*"

The Caroline Miller, 53 Fed. Rep. 137, is a case directly in support of our position. A libel was filed against the Caroline Miller to recover the value of eleven bales of cotton alleged as shipped on board said vessel at Brunswick, Georgia. The cotton was delivered to an agent of the New York & Brunswick Line at Brunswick, Georgia, who receipted for it to be transported by the Caroline Miller from Brunswick to New York. The eleven bales was the undelivered portion of the lot never actually received on board the steamer. The court, on page 137, says: "Upon "the above facts, the steamship is not liable in rem for the "missing bales, because they were never put on board of "the steamer, nor did they ever come into the *possession* "*of the master, or under his control.*" And on page 138: "By the charter of the ship, the owners doubtless author- "ized the master to bind the ship for such goods as the "charterers might deliver to him for transportation, "whether actually put on board or upon the dock, and "under the master's control for that purpose. But here "the *master did not sign any bill of lading, or undertake*

"*to bind the ship, and the missing cotton never came* "*under his control.* The agent of the New York & Bruns- " wick Steamship Line who signed this shipping document " was not the agent of the shipowner, nor of the master. "*The delivery of goods to that agent was, therefore,* "*neither a delivery to the master, nor a delivery to the* "*ship.*" *In the case of the Eugene the outfit of libellants came neither into possession of her master nor under his control.*

In the case of The Guiding Star, 53 Fed. Rep. 936, the court held that no lien exists upon a vessel in respect to goods for which her agents have issued a bill of lading, but which are destroyed while in custody of the keeper of the landing before being received on board or coming under the control of the master. The case is an exhaustive one, and on page 943 distinguishes the case of Bulkly v. Cotton Co., 24 How. 386, cited by libellants in the District Court, in which case it was held that where a vessel lay in the port of Mobile, and her master had agreed to carry cotton from that port to Boston, delivery to a lighter, the master signing bills of lading therefor, was a delivery to the vessel; the court holding that the vessel herself was bound from the time of the delivery by the shipper *and acceptance* by the master, and that the delivery to the lighterman was a delivery to the master. The case of Bulkly v. Cotton Company has no application to the case at bar, because in the case cited the master signed the bills of lading and agreed to transport the cotton in that manner, whereas, in the case at bar, the master had never receipted for the goods.

We call attention to what the court says in the case of the Vigilancia, already cited: "If, on the other hand,

"the libellants' evidence be deemed sufficient to prove "that the title to the property passed in Jersey City to "the steamship company, and that the delivery to the "truckmen there was, in law, a delivery to that company; "still, that would not amount to a delivery, or to a fur-"nishing of supplies, to the ship in Jersey City, *but only* "*to a common-law delivery to the company, sufficient to* "*bind the company in personam: which is a very different* "*thing from a delivery to the ship, or binding the ship* "*in rem.* The ship was not in Jersey City, but within a "different jurisdiction, a mile or two away."

It is true that in this case one of the libellants attempted to show that he had seen a portion of his outfit on board the Eugene, and that it was placed by the Bristol on board the Eugene for the purpose of lightening the Bristol. This statement is flatly disproved by libellant's witness Johnson, the purser on the Bristol, and the representative of Davidge & Co., who, on page 267 (Transcript, p. ; Record, p.224), testifies in substance that the Eugene came across from Port Townsend herself, and put on board the Bristol the stores and outfit of the crew of the Eugene; *that no supplies or outfits were transferred from the Bristol to the Eugene*, and that there was no necessity for lightening the Bristol by any such transfer.

Capt. Geer (Transcript, p. ; Record, p.236) testifies that the stores and outfit of the crew of the Eugene were transferred from the Eugene to the Bristol at Comox; that he never saw libellants until the boat was libelled at Seattle, and that none of the outfits of libellants or any of the other passengers of the Bristol were ever on the Eugene.

Capt. Lewis, master of the Eugene (Transcript, p. 383; Record, p.301), says that neither the libellants nor their

outfits were ever on the Eugene, and that he, as master of the Eugene, never had any dealings with libellants.

Libellants must stand upon their own contract. They are not privy to the contract between the owner of the Eugene and the Portland & Alaska Transportation Company. Their contract is in terms for transportation from St. Michael's to Dawson City.

The power of the charterers to bind the Eugene is governed by the terms of the charter-party. That instrument shows that it was always contemplated that the Eugene might never reach St. Michael's, and all contracts under the charter-party were conditional and executory, and execution of such contracts was to commence only at St. Michael's.

III.

The circumstances under which the Eugene abandoned the voyage were such as to discharge the vessel from any liability which she might otherwise have incurred. She was a light-draught river steamboat, which had been put in as reasonably safe condition as possible to stand the sea trip, having had a truss put in and the decks built up and enclosed. As Capt. Geer says, on page 287 of the transcript: "The trip was in the nature of an experi-" ment, and we could not tell whether the boat could get " through or not."

Capt. Lewis, the master of the Eugene (Transcript, p. ; Record, p.300), says: "She encountered a strong gale " and had to turn back. Her behavior had been good for " a river boat at sea. She had gone from the Columbia " river to Port Townsend safely, and had behaved all right " until the storm was encountered in open sea north of

"Queen Charlotte's Sound." Capt. Geer also testifies as to the condition of the weather and the sea when the Eugene put back.

There had been no absolute undertaking on the part of the Portland & Alaska Trading & Transportation Company that they would land libellants in Dawson City. Gould, from whom libellants purchased their tickets, testifies, in substance (Transcript, p. 346; Record, p279) that McGuire said he would not guarantee that they would get through, and that he himself never made any guarantee that they would.

We admit that the storm encountered by the Eugene was not a hurricane or a tornado; but it was a storm for a vessel such as the Eugene, a light-draught river boat, known as such to libellants and to all the community. And it was commonly known and considered, too, that the venture, at best, was only an experiment.

We contend that libellants and the Portland Trading & Transportation Company had contracted only for a bona fide attempt to put the libellants through to Dawson City; that the attempt was made in good faith and with reasonable precautions; and that as it failed by sea peril, the loss must fall upon libellants.

IV.

As we have argued under the first subdivision, the contract was entered into by libellants with the Portland & Alaska Trading & Transportation Company, in reliance upon the credit and responsibility of that corporation. Libellants themselves have testified that they made inquiries and satisfied themselves as to the solvency and responsibility of the corporation. For any breach of the

contract, their remedy therefore lies against the Portland & Alaska Trading & Transportation Company, and not against the Eugene.

But they have not shown any breach of contract which entitles them to recover even as against the Portland & Alaska Trading & Transportation Company. Gould, from whom they purchased their tickets, stated that he made no guarantees that the boat would get through; and that McGuire had said that he would not guarantee that they would get through (Transcript, p. 346; Record, p.). It is true that "dodgers" were circulated as to the time of the departure of the expedition and the probable date of the departure of the Eugene from St. Michael's and her arrival at Dawson. There is nothing to show that libellants relied upon or contracted with reference to these handbills, or *that their contract was other than evidenced by the tickets which they received in exchange for their money*. Moreover, the handbills were circulated without knowledge or authority of the owner of the Eugene (Jones, Transcript, p. ; Record, p.257).

V.

Damages in the sum of $800 each were awarded to libellants by the District Court. They each paid $300 for a ticket; of which sum, they state under oath, in their original libel, that $200 was to go to the Eugene and $100 to the Bristol. Libellant Jacobi (Transcript, p. 153; Record, p.132) says that his loss on outfit was about $100. Libellant Ruff (Transcript, p. ; Record, p. 76) says that the loss on his outfit was between $40 and $50. The balance of the award could only have been for loss of time or expected profits. They were gone on the expe-

dition, all told, only eight or nine days (Ruff, Transcript, p. 77). Jacobi was a cigar-maker, who worked by the piece, and had no regular and definite earning capacity; and Ruff was a blacksmith, earning on an average, he states, $2.90 per day (Transcript, p. ; Record, p. 77). There is no evidence that either of these libellants would have obtained any employment or would have earned anything at their respective trades had they succeeded in getting through.

Such claims for loss of expected earnings or profits are too remote and speculative to furnish any basis for a recovery.

> Howard v. Stillwell Co., 11 Sup. Ct. Rep. 500.
>
> B. C. Mills Co. v. Nettleship, L. R., 3 C. P. Cases, 499.
>
> Blanchard v. Ely, 21 Wend. 342.

Libellants were absent on this expedition, from the time they left Seattle until they returned, only eight or nine days; and their loss of time, in any event, should be measured by this delay. But it seems to us that the only damages which they could properly recover from the Eugene, *had she begun to carry them and then refused to proceed, would have been their passage-money, $200, and no more.*

VI.

All the reasons which we have urged as justifying a reversal of the decree rendered in favor of Jacobi and Ruff would apply with equal force to any libel of intervention on behalf of Cary, Lyons and Knight, had such libel of intervention been filed. The District Court, misled by proctors for libellants into the belief that a libel of intervention had been filed, has in this case rendered a decree against the Eugene in favor of Cary, Lyons and

Knight, each in the sum of $800, *when no such libel of intervention was in fact ever filed, and when the court had nothing before it upon which to base such decree.*

The decree, in so far as it awards any damages to Cary, Lyons and Knight, is a nullity, no suit having been instituted in their behalf against the Eugene.

Windsor v. McVeigh, 93 U. S. 274, 280.

In conclusion, and by way of summary, we urge the following considerations:

The maritime lien is stricti juris, and cannot be extended by implication. The lien for breach of charter-party arises only after performance of the charter-party has been begun by the ship; that for supplies, only after the furnishing of the supplies to the ship; and that for breach of contract for the carriage of freight or passengers, only after the passengers have gone on board the vessel or the freight has been delivered on board the vessel or placed within the immediate control or custody of the master. While, for breach of a contract not actually undertaken, the injured party has his action in personam against the person with whom he had contracted, *anything short of actual performance on the part of the vessel is insufficient to create a maritime lien upon the vessel.*

In this case, libellants contracted, not with the Eugene, but with the Portland & Alaska Trading & Transportation Company; and upon its credit, and not that of the boat—which was not then at Seattle, where the contract was entered into. Under these circumstances, they dealt not with the boat but with the Portland & Alaska Trading & Transportation Company; and their rights against the boat must be measured by the power to bind the boat

given by its owners to the Portland & Alaska Trading & Transportation Company. And as this corporation had no right to contract for the carriage of freight or passengers on the Eugene, except upon the arrival of the boat at St. Michael's, the boat is not bound by any contracts which may have been made by the corporation in excess of the powers granted it under the contracts.

The voyage of the Eugene, for which libellants contracted with the Portland & Alaska Trading & Transportation Company, was to begin at St. Michael's, not at Seattle. Libellants have stated under oath in Article III. or their original libel (Record, p. 4), that they engaged passage for themselves and baggage from Seattle to Dawson City, and purchased from the manager and agent of the Bristol and Eugene two tickets for their passage, one for the conveyance of themselves and baggage by the Bristol from Seattle to St. Michael's, and the other for the conveyance of themselves and baggage from St. Michael's to Dawson City, the second ticket reading:

"Portland & Alaska Trading & Transportation Co.

" Good for one passage from St. Michael's, Alaska, to
" Dawson City, N. W. T., via S. S. Eugene.
" Name of passenger ....

"E. B. McFARLAND,
"General Manager."

And these sworn admissions must bind libellants.

As to the three vessels upon which libellants were to be conveyed, each was to perform an independent voyage. That of the City of Kingston was to begin at Seattle and end at Victoria; that of the Bristol was to begin at Vic-

toria and end at St. Michael's; and that of the Eugene was to begin at St. Michael's and end at Dawson City.

A maritime lien could only arise as to the vessel Eugene by reason of breach of a contract undertaken at St. Michael's after there receiving on board libellants and their outfits. Any contract on the part of the Portland & Alaska Trading & Transportation Company for matters occurring prior to the arrival of the Eugene at St. Michael's, and there receiving on board the passengers and freight, was executory only and insufficient to bind the vessel. For any such breach of contract, libellants have their action in personam against the Portland & Alaska Trading & Transportation Company; but they have no action in rem against the Eugene.

The tow-line passed from the Bristol to the Eugene outside of Victoria did not make the Bristol and Eugene one vessel so as to make the embarking of libellants on the Bristol an embarking on the Eugene. The voyage of the Eugene, within the terms either of the charter-party or the ticket, had not begun. She was herself being conveyed to her point of departure. The delivery of the outfits of the libellants to the wharfinger at the Yesler dock at Seattle, where these outfits were placed on board the City of Kingston, was not a delivery to the Eugene, inasmuch as it was not a delivery to the master of the Eugene or to any one under his control or subject to his direction. Nothing short of the actual receipt of the outfit by the master of the Eugene, or some one signing the receipt by his direction and on behalf of the vessel, would be a delivery to the ship sufficient to sustain an action in rem against her; although it might be a common-law delivery suf-

ficient to sustain an action in personam against the Portland & Alaska Trading & Transportation Company.

For all of the above reasons, as well as upon the ground of excessive damages, the decree of the District Court should be reversed, with instructions to that court to dismiss the libel. The decree, in so far as it gives any award to Cary, Lyons and Knight, is absolutely void, for the reason that no libel of intervention was ever filed in the District Court, and that court had consequently no jurisdiction to render such decree.

Respectfully submitted.

STRUDWICK & PETERS,

WILLIAMS, WOOD & LINTHICUM,

Proctors for Appellant.

430

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

THE STEAMBOAT EUGENE.
GASTON JACOBI and CHARLES RUFF,
Libellants and Appellees.
JOEL P. GEER, *Claimant and Appellant.*
WALTER M. CARY, FRED M. LYONS, and EDWARD J. KNIGHT, named in the decree as intervenors, *Appellees.*

Second Brief for Appellant

STRUDWICK & PETERS,
WILLIAMS, WOOD & LINTHICUM,
Proctors for Appellant.

PORTLAND, OREGON
MULTNOMAH PRINTING COMPANY, SECOND AND YAMHILL
1898

FILED
APR 4 - 1898

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

THE STEAMBOAT EUGENE.

GASTON JACOBI and CHARLES RUFF,
Libellants and Appellees.

JOEL P. GEER, *Claimant and Appellant.*

WALTER M. CARY, FRED M. LYONS, and EDWARD J. KNIGHT, named in the decree as intervenors, *Appellees.*

Brief for Appellant on Motion to Dismiss Appeal

Appellees have moved to dismiss the appeal: First, because, as they maintain, the decree appealed from is not a final decree; and second, on the ground that one C. Hennigar, mentioned in the decree of the District Court, is not joined as a party on the appeal. Upon the argument, the first point alone was urged, and we shall therefore confine ourselves, in the main, to a reply to that.

The decree is a final decree, and is set forth in full on pages 306, etc., of the printed record in this cause. The parties named in this title are all joined as appellant or appellees, and it is designated as a final decree. After various recitals, one of which is to the effect that the Eugene is liable in specie, it is decreed as follows:

"It is hereby ordered, sentenced and decreed, that the "said steamship Eugene, her tackle, apparel and furniture, "be and the same hereby are condemned for the payment "of the aforesaid amounts; to wit, for the payment of the "sum of eight hundred ($800.00) dollars to the libellant, "Gaston Jacobi, and for the further sum of eight hundred "($800.00) dollars to the libellant, Charles Ruff, together "with the costs and disbursements of this action, taxed at "the sum of dollars. And a stipulation having been "duly entered into and filed in this cause by the respective "parties, wherein it is stipulated and agreed that the inter- "venors, Fred M. Lyons, Walter M. Carey, and Edward "J. Knight, shall abide the result of the trial of the issues "between libellants and claimants herein, and shall be enti- "tled to the same recovery, upon their intervening libels "herein, as might be recovered by the principal libellants, "Jacobi and Ruff; therefore, in accordance with said stipu- "lation, and on motion of the proctor of said intervening "libellants, it is ordered, sentenced and decreed that the "said intervenor Fred M. Lyons have and recover herein the "sum of eight hundred ($800.00) dollars, and that the said "intervenor Walter M. Carey do have and recover herein a "like sum of eight hundred ($800.00) dollars, and that the "intervenor Edward J. Knight do have and recover a like "sum of eight hundred ($800.00) dollars, together with their "costs and disbursements herein, taxed at the sum of "dollars, and that the said steamship Eugene, her tackle, "apparel and furniture, be and the same hereby are con- "demned to the payment of the said sum.

"And it is further ordered that the claim of the interven-
"ing libellant, C. Hennigar, be reserved for such judgment or
"order as the court deems just, upon such further hearing
"as may be had upon the issues therein.

"And it is further ordered, adjudged and decreed that the
"said steamship Eugene, her tackle, apparel and furniture,
"be by the marshal of this district exposed for sale, and sold
"at public vendue to the highest and best bidder for cash,
"after due notice as provided by law and the rules and prac-
"tice of this court, and that the said marshal pay the pro-
"ceeds arising from such sale, after deducting the costs and
"expenses thereof, into the registry of this court, there to
"await the further order of the court in the premises as to
"the distribution of the same; and to that end it is ordered
"and decreed that the clerk of this court issue a decree of
"venditioni exponas to the said marshal, returnable as re-
"quired by the rules and practice of this court, and that the
"said marshal execute the same and make return thereof
"with all convenient speed. C. H. HANFORD, Judge."

The finality of a decree is to be determined by its effect upon the parties, and on the issues raised between them. If these issues are settled, and a sum is found due from one to the other, and execution of the decree is ordered, the decree is final and an appeal will lie.

The issues raised between the parties and presented upon the appeal have all been determined by the decree. Libellants proceeded against the Eugene for an alleged breach of contract for which they sought damages, each in a specified amount, and prayed that the boat be condemned and sold to pay the same. The appellant claimed the boat, and, on its behalf, contested libellants' right to proceed against the boat in rem, to sell the boat, and to recover damages. These were the issues.

The decree awards each of the libellants damages in the sum of $800.00; condemns the Eugene for the payment of

these sums in favor of libellants, and of equal sums in favor of the appellees, Lyons, Carey and Knight, whom it mentions as intervenors upon the same issues; and directs a writ of venditioni exponas to issue to the marshal for the sale of the boat under the decree, and that the marshal execute the same and make return thereof with all convenient speed. It is a complete determination by the District Court of the matters presented by the libel and answer. It awards a definite amount to libellants, decides that a maritime lien exists in their favor upon the Eugene, and directs the execution of the decree by a sale of the boat by the marshal under the admiralty process of the court. It is true that the decree directs that the net proceeds of sale be paid into the registry of the court, there to await the further order of the court as to its distribution. Such future order of distribution could, however, have no effect upon the award made under the decree itself. Claimant could no longer contest the right of appellees to the payment of their awards under the decree out of the fund so to be deposited; because the decree had fully settled and determined that, and was subject to review only by this appeal. The damages were fixed by the decree; and the boat was condemned therefor, and ordered sold in execution of the decree. Such a decree, as to appellant, is final.

Whiting v. Bank, 13 Peters, 6, 15.
The Alert, 61 Fed. Rep. 113.
Withenbury v. U. S., 5 Wall. 819.
Forgay v. Conrad, 6 How. 204.
Thomas v. Dean, 7 Wall. 342, 346.
R. R. Co. v. Bradleys, 7 Wall. 575.
R. R. Co. v. Soutter, 2 Wall. 440.
Hill v. R. R. Co., 140 U. S. 52.
Stovall v. Banks, 10 Wall. 583.
French v. Shoemaker, 12 Wall. 86.
Winthrop Iron Co. v. Meeker, 109 U. S. 180.

As is said by the Supreme Court in French v. Shoemaker, 12 Wall. 98: "Several cases might be referred to where it "is held that a decree of foreclosure and sale of mortgaged "premises is a final decree, and that the defendant is entitled "to his appeal without waiting for the return and confirma- "tion of the sale by an order, upon the ground that a decree "of foreclosure and sale is final as to the merits, and that the "ulterior proceedings are but a mode of executing the orig- "inal decree."

And the same court, in Thomas v. Dean, 7 Wall. 346, adopting its own language in Forgay v. Conrad, 6 How. 204, says: "And when the decree decides the right to the prop- "erty in contest . . . or directs it to be sold, or directs "the defendant to pay a certain sum of money to the com- "plainant, and the complainant is entitled to have such "decree carried immediately into execution, the decree must "be regarded as a final one to that extent, and authorizes "an appeal to this court."

And the Circuit Court of Appeals for the second circuit, in The Alert, 61 Fed. Rep. 115: "The decree was a final one "as between libellants and claimants. It directed the pay- "ment of a specified sum of money to the libellant by claim- "ant, and ordered its immediate execution."

In Withenbury v. United States, 5 Wall. 819, libels had been filed in the District Court for the condemnation, as prizes of war, of large quantities of cotton. The libels were consolidated and claims interposed as to the various lots. Withenbury, one of the claimants, denied the validity of the capture, and insisted on his title to 935 bales. His claim was dismissed with costs by the District Court, and execution ordered issued. From this decision he appealed; and the appellee moved to dismiss the appeal, on the ground that the decree was not a final one. The court says on page 821: "It appears from the record that the decree disposed "of the whole matter in controversy upon the claim of With-

" enbury and Doyle. It was final as to them and their rights,
" and it was final, also, so far as the claimants and their rights
" are concerned, as to the United States. It left nothing
" to be litigated between the parties. It awarded execution
" in favor of the libellants against the claimants." And the
motion to dismiss was denied.

In Hill v. Chicago & E. R. Co., 140 U. S. 52, the District Court dismissed the bill against several defendants for want of equity, denied relief to complainant upon all matters in controversy except one item, referring the case to a master to ascertain that, and retained the case only as against the parties interested in that matter. On page 691 the court says: "The rights and liabilities of all the parties were in
" other respects determined. But there was no adjudica-
" tion as to the payment of the amount to be ascertained by
" the master. That remained unsettled." And the court
held that such a decree was a final one. "All the merits of
" the controversy pending between them and the com-
" plainant were disposed of, and could not be again reopened,
" except on appeal from that decree."

In Railroad Co. v. Bradleys, 7 Wall. 575, the lower court rendered a decree ordering an injunction previously granted to restrain a sale under a deed of trust to be dissolved, and directed a sale according to the deed of trust and the bringing of the proceedings into court to abide further orders. The Supreme Court held such a decree to be a final one, from which an appeal would lie.

In Whiting v. The Bank of the United States, 13 Pet. 6, an appeal was taken from a decree of foreclosure and sale, and appellee moved to dismiss the appeal on the ground that the decree appealed from was not final. The language of the Supreme Court, on page 15, is especially pertinent, we submit, to this case. The court there says: "The original
" decree of foreclosure and sale was final upon the merits of
" the controversy. The defendants had a right to appeal

"from that decree, as final upon those merits, as soon as "it was pronounced, in order to prevent irreparable mischief "to themselves. For if the sale had been completed under "the decree, the title of the purchaser under the decree "would not have been overthrown or invalidated, even by a "reversal of the decree; and consequently the title of the "defendants to the lands would have been extinguished, and "their redress upon the reversal would have been of a differ-"ent sort from that of a restitution of the land sold."

If, in this case, the appellant should be obliged to wait until the sale of the Eugene under the decree of the District Court before this appeal could be taken, in the event of a reversal an irreparable mischief to himself would be occasioned; because the title of the purchasers of the boat under the decree of the District Court would not be overthrown or invalidated, even by a reversal of the decree.

Hennigar was not a necessary party to the appeal. He was not a libellant or a claimant. No issues have been raised as between himself and the parties to the appeal, and no decree has been rendered either in his favor or against him. It is not an appeal as to the Hennigar intervention which is before the court. All parties necessary or proper for the complete determination of every issue raised between the libellants, the so-called intervenors (Carey, Knight and Lyons), and the claimant are before this court, and every one whose rights are involved in this appeal is a party to it.

Where a decree is several, both in form and substance, and the interest of each defendant thereunder is separate and distinct from that of the other, one defendant may appeal alone without a summons and severance, or equivalent proceeding.

Gilfillan v. McKee, 159 U. S. 303.

In the present case, Hennigar is neither a libellant nor a respondent. His action is based upon repairs made upon the Eugene (record, page 11)—a matter entirely separate

and distinct from the causes of action of the appellees. The appeal is taken from that part of the decree awarding damages to the appellees, which is separate and complete in itself.

The intervening libel of Hennigar was not prosecuted to a determination. On the contrary, the proctor of record for Hennigar, prior to the rendition of the decree appealed from, filed a praecipe for the dismissal of such libel of intervention. (Record, page 41.)

For the above reasons, we respectfully submit that the motion to dismiss should be denied.

Reply Brief for Appellant on the Merits

We shall confine ourselves in this portion of our brief strictly to answering the brief for the appellees; and, in the main, to calling the attention of the court to the differences between the facts as stated by the appellees and those disclosed by the record on appeal.

We admit that the Eugene was in the possession of the Portland & Alaska Trading & Transportation Co. at the time of that company's dealings with appellees. She was not, however, at Seattle, where they dealt, or at any point within the state of Washington, but in Oregon, a different jurisdiction; and appellees dealt, not with the vessel and with persons apparently in charge of her, but with a corporation upon whose responsibility they relied, and with which they personally contracted, on the faith of the responsibility of such corporation. The credit of the Eugene did not enter into the contract at all. They had never seen that vessel, which was several hundred miles away, in another state.

In reply to "b," page 11:

There is no testimony even tending to show that appellant and the owners of the Eugene ever knew that the Portland & Alaska Trading & Transportation Co. held itself out as the owner of the vessel, or that they consented to any such misrepresentation. Indeed, it plainly appears to the contrary. In the advertisements published by that corporation, without the knowledge or authority of the owners of the Eugene, that corporation was not held out as the owner. Libellants' Exhibit E (Supplemental Record, page 13) reads: "The steamer Eugene, under the management of the P. & "A. T. & Tr. Co." Libellants' Exhibit G (page 15) reads: "This company secured the Willamette river steamboat "Eugene."

The statements in the Davidge contract as to the ownership of the Eugene were known neither to appellant nor to the appellees, and neither of them were parties to the contract; and it could have no effect upon the rights of the former.

In reply to "c," page 12:

It is not true that appellant has admitted that the Portland & Alaska Trading & Transportation Co. had the right and authority to employ the Eugene in the manner in which appellees contend she was employed. The testimony quoted on page 12 of appellees' brief is that of Jones, not of Geer, and must be read in connection with the remainder of Jones' testimony. It is found on page 269 of the record, and is preceded by the following questions and answers, on cross-examination:

"Q. Did the McGuires or the Transportation Company, "so far as this expedition was concerned, and the sale of "tickets and passengers here, that was no breach of their "contract with you, was it?"

"A. I don't know anything about the sale of tickets.

"Q. Do you claim that contract was broken by the sale "of tickets to passengers or the attempt to transfer passen-"gers from here to Dawson City?

"A. They did not attempt to transport any passengers "on the Eugene."

Upon re-direct examination, this witness testified as follows (record, p. 273):

"Q. Do you know anything about the method or man-"ner in which McGuires, Davidge or anybody sold tickets "here in Seattle? Do you know anything about the way "in which they sold them to persons?

"A. No; all I know about it is what I heard. I just "heard—they told me they were selling them on the Bristol "to go to St. Michael's, and from St. Michael's they were "to be transferred to the Eugene, if they got her up there.

"Q. Now, you don't know yourself much about how "these transactions were had by the Portland & Alaska "Trading & Transportation Company with these passen- "gers?

"A. No, I do not.

"Q. Of your own knowledge?

"A. No, I don't know anything about it; I know in "Portland how they were offering to sell them to passen- "gers.

"Q. What were they doing there?

"A. Why, when I have been in there, the passengers "have asked them, suppose they didn't get through with "the Eugene, what they were going to do with them, and "they told them they would have to take the same chance "as well as themselves, but they expected to get her "through; they thought there would be no doubt but what "they would get her through, but they could not guarantee "against any elements.

"Q. Did you ever authorize or did the owners of the "Eugene ever authorize the Portland & Alaska Trading & "Transportation Company to warrant that the Eugene "would arrive at St. Michael's?

"A. No, sir.

"Q. Or to sell tickets on the Eugene to begin at any "other point than St. Michael's, if she got there?

"A. No, sir, I did not.

"Q. Did they have any authority to deal with the "Eugene other than as embraced in these two contracts?

"A. No, sir, not that I know of. I had been dealing "with them myself pretty much; they didn't have any author- "ity to deal in any other way than as in these contracts.

"Q. From what point to what point did they have "authority to sell tickets on the Eugene?

"A. From St. Michael's to Dawson City."

And the appellant Geer testified (record, page 258):

"Q. They had the use of this vessel for that voyage, and "whatever legal business they chose to carry on, did they "not?

"A. They had the use of the vessel from the mouth of "the Yukon to Dawson City.

"Q. And from Portland up, did they not?

"A. They were not to use the vessel from Portland up "for any purpose."

The testimony on behalf of appellant is clear and explicit to the effect that all that the Portland & Alaska Trading & Transportation Co. was authorized to do was to use the Eugene on the Yukon river from St. Michael's to Dawson, provided she reached that river; and that said corporation was not authorized to bind the boat to reach the river.

In reply to "d," page 13:

Geer was on the Eugene, and not on the Bristol, during the trip, and could not know what took place on the latter vessel.

In reply to "e," page 13:

Jones was an incorporator of the Portland & Alaska Trading & Transportation Co., but he owned no stock, signed the papers for accommodation only, was not an officer, and had no part in the management. Consequently he was not a party to the contracts of that corporation with appellees. Even were he such a party, the fact of his being a stockholder of the corporation owning the Eugene would not make the latter corporation a party to such contracts.

As to the authorities cited by appellees on pages 14 and 15 of their brief:

Section 4286, Revised Statutes, from which appellees quote at some length, forms a portion of the act limiting the liability of owners of vessels, and places the owner operating his own vessel and a charterer operating a chartered vessel in the same position with reference to a limitation of liability. It has no application to the case now under consideration.

The doctrine laid down in The City of New York, 3 Blatchf. 187, has been overthrown by the Supreme Court in The Kate, 164 U. S. 458, which holds that no liability exists for supplies furnished upon the order of a person known as charterer, or who by the exercise of reasonable diligence could have been known as such.

We do not dispute the correctness of the decision in The Freeman, 18 How. 182, cited by appellees, but we submit that it has no application to this case, as a person seeking to enforce a maritime lien by virtue of a contract with one not the owner in fact, or the master, must show that he dealt with the vessel upon the credit of the vessel, and that the vessel either received the benefit of the supplies, or, in the case of a contract of affreightment, that the goods were laden on the vessel.

We strenuously dispute the correctness of the alleged summary of facts contained in appellees' brief, on pages 17 et seq., in the following particulars:

Francis B. Jones was not interested in the Portland & Alaska Trading & Transportation Co.

A part only of the crew of the Eugene was hired and paid by the Portland & Alaska Trading & Transportation Co.

The Eugene was to be used by the Portland & Alaska Trading & Transportation Co., not in the Alaskan transportation business, but only for one trip upon the Yukon river, beginning at St. Michael's and ending at Dawson City.

C. W. Gould, who sold the tickets at Seattle to appellees, was not the agent of the Portland & Alaska Trading & Transportation Co., but the representative of Davidge & Co., the charterers of the Bristol; and the expedition, so called, was not an expedition of the Eugene from Seattle. The poster (supplemental record, p. 9), introduced on behalf of appellees, reads:

"To Dawson City this year! The s. s. Bristol to St.

"Michael's, and steamer Eugene, St. Michael's to Dawson "City direct. * * * C. W. Gould, Agt."

The advertisements published in the Seattle newspapers were so published without the knowledge of the owner of the Eugene or of her master, and at a time when the vessel was herself in a different jurisdiction.

Appellees did not contract in reliance upon these advertisements, and the advertisements form no part of their contract, which are sufficiently and unmistakably evidenced by the three tickets issued to each passenger—one good from Seattle to Victoria, one from Victoria to St. Michael's, and one from St. Michael's to Dawson City.

We furthermore submit that the advertisements themselves show that they did not refer to a trip on the Eugene from Seattle to Dawson. The heading of Appellees' Exhibit "D" (supplemental record, page 12) reads:

"For Dawson City direct. The Bristol is preparing to "make a record-breaking trip into the Yukon."

"E": "For Dawson City: Passengers will take the "Bristol for St. Michael's."

"F": "Eugene for Dawson City. Will take the Bristol's "passengers up the Yukon river."

"To make a fast voyage. The steamship Bristol's trip to "the mouth of the Yukon river."

"G": "The Bristol next."

"H": "They go tomorrow. The Bristol's passengers "to Dawson City direct."

"I": "The Bristol tonight."

"J": "Off for the mines. A big crowd left last night to "go on the Bristol."

There are no representations that the Portland & Alaska Trading & Transportation Co. owned the Eugene. If there were, they were unknown to and unauthorized by her owner.

The fare was $300.00 through to Dawson, but the tickets

were separate. Through tickets are regularly sold and bills of lading issued on this coast for points in Europe, via Atlantic steamers; but these steamers are not bound by any such contracts until they themselves receive the passenger or freight.

The Bristol, by the contract, was to convoy (not tow) the Eugene, for the better enabling the latter to arrive at St. Michael's, where her voyage was to begin.

The passage-money was paid to Gould, the chosen representative of Davidge & Co., who, out of the total moneys received, kept $15,000.00 for the Bristol, and then paid the surplus to the Portland & Alaska Trading & Transportation Co.

The Eugene never assumed control of the passengers' outfits, nor did her master nor any one authorized by her to do so.

The plans as to the starting point of the Bristol were never changed. She being a British vessel, she could not leave Seattle for St. Michael's, both points being within the United States.

The transportation of the passengers to Comox was paid by Davidge & Co. (Record, p. 200.)

Although Mr. McFarland, of the Portland & Alaska Trading & Transportation Co., was on the Bristol, the alleged expedition was managed by the master and purser of the Bristol, except in so far as the passengers on the Bristol, including appellees, ran things themselves. Appellees were never on the Eugene as passengers. No outfits of passengers were ever put on the Eugene. Those of the crew of the Eugene were transferred to the Bristol at Comox.

The letter of McFarland, referred to on page 20 of appellees' brief, shows that the passengers were those of the Bristol, and not of the Eugene.

Appellees' Authorities:

Price v. The Thos. Newton, 41 F. R. 106, was a case in which goods were delivered to an agent of a vessel at her regular landing place, where she herself was to take them. The goods were there receipted for by the agent on behalf of the vessel. The dock at which appellees' goods were placed, in the case at bar, was the landing place of another boat, some two thousand miles distant from the port at which the Eugene was herself to receive them. It might be a common law delivery sufficient to bind the Portland & Alaska Trading & Transportation Co., but it is preposterous to claim that it was such a delivery as would support a maritime lien, which is stricti juris, as against the Eugene.

In Bulkley v. Cotton Co., 24 How. 386, the master receipted for the goods, which were lost while on the lighter; and the receipt by the master and his acceptance of the goods in this manner were held sufficient. In the case before this court, the master never saw the goods, much less received them on behalf of the vessel.

In The Oregon, Deady, 179, the vessel paid the lighter, and the master of the Oregon treated the other vessel as in his employ, controlling her movements. The freight was landed at the wharf designated by the master for unloading the goods in order to physically receive the goods aboard the Oregon, and such delivery, being in the presence of the officers of the Oregon, was held by the court to be a delivery to her, especially as the vessel receipted for the goods.

As shown by the cases cited in our opening brief, The Pacific, 1 Blatchf. 569, has been overruled by the Supreme Court.

Appellees fail to recognize the distinction between delivery to a common carrier and such delivery to a ship as is sufficient to bind the ship. Receipt by an agent is sufficient to bind the carrier personally, but only delivery to the vessel

herself, either actual or such delivery as is equivalent to actual delivery, can bind the vessel herself.

It is lastly insisted by appellees that Carey, Lyons and Knight were properly before the court as parties, and that the decree in their favor was regularly rendered, with appellants' consent. We submit that such is not the fact.

The record, pages 366 and 367, shows indorsements on the alleged intervening libel, as follows:

"Intervening libel of Walter M. Carey et al. Presented "and offered for filing in my office, and fee for filing paid to "me, November 6, 1897, but withheld from filing awaiting "stipulation for costs. R. M. Hopkins, Clerk, by H. M. "Walthew, Deputy." And a similar certificate is given by the clerk as to the praecipe for appearance. (Record, page 367.)

No stipulation for costs was ever filed by these alleged intervenors, and their libel was never filed by the clerk. The transcript on appeal, filed in this suit, certified to by the clerk of the District Court as containing the complete record of the case in the District Court, does not include the intervening libel, for the sufficient reason that such libel was never filed.

Admiralty Rule 34 of the Supreme Court provides as follows: "But every such intervenor shall be required, upon "filing his allegations, to give a stipulation, with sureties, "to abide by the final decree rendered in the cause, and to "pay all such costs and expenses and damages as shall be "awarded by the court upon the final decree, whether it is "rendered in the original or appellate court." This rule wisely provides, for the protection of both officer and adverse party, that the stipulation for costs is a prerequisite to the filing of an intervening libel. No such stipulation having been given, the clerk properly refused to file the libel; keep-

ing it in his custody, and not as part of the records of the District Court, until the stipulation should be given. And as no stipulation was thereafter given at any time, the libel never was filed by the clerk.

We submit that the decision of this court in Mutual Life Ins. Co. v. Phinney, 76 Fed. Rep. 617, is decisive to the effect that under such circumstances the custody of the paper does not constitute filing, and that the District Court was without jurisdiction to render any decree in favor of the alleged intervenors. In that case, the writ of error was delivered by appellant to the clerk of the lower court, but was not indorsed as filed, for the reason that the clerk deemed that it should be actually indorsed by the clerk of the Circuit Court of Appeals. Notwithstanding the fact that the writ of error and citation were actually delivered to and filed and lodged with the clerk of the Circuit Court, yet this court held that actual indorsement of the papers as "filed" was essential, and that without such indorsement it had no jurisdiction.

The facts in that case were far stronger than in the one now before this court. In that case, the intent to file existed in the minds of both party and clerk, and the latter neglected to make the indorsement, for the reason that he considered every requisite had already been complied with. In this case, the clerk refused to file until the party complied with Admiralty Rule 34 by giving the stipulation therein required.

It is insisted by appellees that, by reason of the stipulation on page 368 of the record, the objection of appellant as to Carey, Lyons and Knight comes too late, and cannot now be heard. A waiver by a stipulation on a matter substantially affecting the rights of a party must, we submit, be apparent upon its face. The stipulation does not name any intervenor; and consequently, we submit, it cannot preclude appellant from such objections.

Moreover, consent cannot confer jurisdiction; and where parties are not before the court by the filing of their libel, the appearance of the adverse party cannot of itself give the court jurisdiction. Irregularities in process may be waived by a general appearance; but where, as in this proceeding, no suit has been instituted, we submit that Carey, Lyons and Knight were not before the District Court, and they could not be brought into court by the stipulation, conceding to the latter all the effect claimed for it by appellees.

Respectfully submitted.

STRUDWICK & PETERS,
WILLIAMS, WOOD & LINTHICUM,
Proctors for Appellant.

430

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE STEAMBOAT EUGENE, GASTON JACOBI and CHARLES RUFF,

Libellants and Appellees,

JOEL P. GEER, *Claimant and Appellant,*

WALTER M. CARY, FRED M. LYONS and EDWARD J. KNIGHT,

Intervenors and Appellees.

BRIEF OF APPELLEES ON MOTION TO DISMISS

JOHN C. HOGAN AND
PATTERSON & EASLY,
Proctors for Appellees.

SEATTLE, WASHINGTON.

LOWMAN & HANFORD S. & P. CO., SEATTLE

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE STEAMBOAT EUGENE, GASTON JACOBI and CHARLES RUFF,
Libellants and Appellees,

JOEL P. GEER,
Claimant and Appellant,

WALTER M. CARY, FRED M. LYONS and EDWARD J. KNIGHT,
Intervenors and Appellees.

BRIEF OF APPELLEES ON MOTION TO DISMISS.

MOTION TO DISMISS APPEAL.

Appellees hereby move the court to dismiss the appeal in this cause for the reason that the decree appealed from was not a final judgment, and therefore not one

from which an appeal might be taken according to law.

The decree in this case was an award of damages in favor of each of the libellants and intervenors in a fixed sum to each, with a direction that the vessel libelled be sold and the proceeds be paid into the registry of the court, but by its terms, the decree reserved other material issues in the case for further determination by the court.

(1) After fixing the amount of the appellees' several recoveries the decree provided—

"And it is further ordered that the claim of the intervening libellant, C. Hennigar, be reserved for such judgment or order as the court may deem just upon such further hearing as may be had upon the issues herein." (See Decree, Trans. pp. 405–407, Record p. ——.

C. Hennigar mentioned was a libellant who had lawfully intervened in the cause with leave, by the filing of his libel and stipulation for costs before default entered. (See Trans. pp. 12–13, 14 and 404, and Record p. ——.

The claim of Hennigar was for repairs made subsequent to the original libellant's claims, and he sought priority over them. A stipulation signed by appellant's proctors as well as the proctors for appellees, was entered into in relation to the Hennigar libel as follows:

"It is hereby stipulated that the libel on account of repairs herein originally filed, shall stand herein as undetermined and an existing libel herein, and that the present owners of said claim for repairs shall, if they so desire, amend said libel and substitute for the original libellent, the present owner of said claim for repairs (Dated) November 30, 1897." (See Trans., p. 440, R. p.——

(2) And further, the decree appealed from did not make any distribution of the funds to come into the registry of the court or establish the priorities between the libellants and intervening libellants, but by its terms, the decree expressly reserved the matters of distribution and priority for the further judgment of the court. The decree in that respect provided—

"That the marshall shall pay the proceeds arising from such sale, after deducting the costs and expenses thereof, into the registry of this court, there to await the further order of the court in the premises as to the distribution of the same." (See Trans. p. 405-7.)

It is plain therefore from an inspection of the decree itself that the court below, in entering the judgment appealed from, did not complete its decretal action in the case, but expressly reserved the cause for the decision and determination of further questions between the parties from the decision of which future appeals might lie, namely:—

First—The question of the validity and amount of the undetermined libel of Hennigar, and,

Second—The question of priority between the different libellants and intervening libellants and the distribution of the funds, as well as the adjusting of costs.

Leaving either of these questions open for future decision, the decree would not be final and therefore not appealable, for there can be but one appeal in a cause.

The test of a final decree is stated by Chief Justice Waite to be as follows:—

"That judgment is final for the purposes of a writ of error to this court, which terminates the litigation be-

tween the parties on the merits of the case, so that, if there should be an affirmance here, the courts below would have nothing to do but to execute the judgment already rendered. If the judgment is not one which disposes of the whole case on the merits, it is not final."

Bostwick vs. Bunkerhoff, 106 U. S., 3.

The judgment here appealed from does not answer this definition, for if it should be affirmed, the court below would have still to determine on the other libel pending, on the matters of priority and distribution. From an error of judgment on these questions, a further appeal would lie.

"Where the district court of the United States, sitting in admiralty, decreed that a sum of money was due, but *the amount to be paid was dependent upon other claims that might be established*, this was not such a final decree as would justify an appeal to the supreme court." (Syllabus.)

Montgomery vs. Anderson, 21 How., 386.

And in the same case the court in its opinion says:—

"Under the act of Congress, no appeal would lie from the district to the circuit court until there was a final decree upon the whole case, that is, *not until all the claims on the money in the registry had been ascertained and adjusted* and the whole amounts of the proceeds of the sale *distributed* by the decree among the parties which the district court deemed to be entitled, according to their respective *priorities*."

Montgomery vs. Anderson, supra.

In the case of *Mordeci vs. Lindsay, 19 How., 199*, where the district court found in favor of libellants, but referred the matter to the clerk of the court "to ascer-

tain the charges to be made against the respective parties to the suit," it was held not to be a final decree.

"A decree setting aside a transfer and ordering a reference to ascertain amounts and priorities of creditor's claims, is not final within the rule."

Talley vs. Curtain, 7 C. C. A., 1.

"A decree awarding a certain rate of salvage of the proceeds is not a final decree, but at most only an interlocutory decree in the nature of a final decree," and in the opinion Judge Story said:—"It was interlocutory in its character for many purposes. It directed that *the charges and expenses of keeping and selling the property and the fees and charges of the officers of the court* to be first deducted from the proceeds of the sale. Now the exact amount of these charges and fees were not ascertained and were necessarily open to further inquiry, and might become matters of controversy between the parties in which they might have the right to take the opinion of the court."

The Steamboat New England, 3 Sumner, 495.

"In the district court the libel was dismissed and the damages against the captors. There had been a reference to a commissioner to ascertain the amount of the damages and before the report of the commissioner had been acted upon, the appeal was taken," * * * Chief Justice Marshall said: "The court has had the question submitted in this cause under consideration, and is of opinion that the appeal is not well taken. The decree of the district court was not final in the sense of the act of Congress. The damages remain undisposed of, and an appeal may still lie upon that part of the decree awarding damages."

The Palmyra, 10 Wheat., 502.

Benedict's Admiralty (2d ed.), page 345, lays down the law in respect to what decrees in admiralty are final so as to be appealable, as follows:

"The final decree is not that which decides upon the substantial merits of the case, but that which completes the decretal action of the court. If, therefore, there remain to be made any order,—for costs,—for confirmation of a report,—for distribution, or other order which is but a consequence of the decree on the merits, the appeal cannot be entered until such order is made; that is the final decree; not till then is it in a state for execution without further action of the court below."

And in Henry's Admiralty Jur. and Pro., p. 391, it is said:

"A decree in favor of libellants for an ascertained amount payable out of a fund arising from the sale of a vessel, but the amount payable in the decree depended upon the ascertainment of other claims upon the same fund and not adjudicated, is not a final decree and no appeal will lie until all the claims on the money in the registry have been adjudicated, and a final decree of distribution has been entered, adjudging the respective priorities and rights of the parties entitled."

Under the authorities we respectfully submit to the consideration of the court that the decree in this case was not a final judgment from which an appeal would lie, and this appeal ought, therefore, to be dismissed.

JOHN C. HOGAN AND
PATTERSON & EASLY,
Proctors for Appellees.

430

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE STEAMBOAT EUGENE, GASTON JACOBI and CHARLES RUFF,
Libellants and Appellees,

JOEL P. GEER, *Claimant and Appellant,*

WALTER M. CARY, FRED M. LYONS and EDWARD J. KNIGHT,
Intervenors and Appellees.

FILED
FEB 28 1898

BRIEF OF APPELLEES

JOHN C. HOGAN AND
PATTERSON & EASLY,
Proctors for Appellees.

SEATTLE, WASHINGTON.

LOWMAN & HANFORD S. & P. CO., SEATTLE

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE STEAMBOAT EUGENE, GASTON JACOBI and CHARLES RUFF,
Libellants and Appellees,

JOEL P. GEER,
Claimant and Appellant,

WALTER M. CARY, FRED M. LYONS and EDWARD J. KNIGHT,
Intervenors and Appellees.

BRIEF OF APPELLEES ON MOTION TO DISMISS.

MOTION TO DISMISS APPEAL.

Appellees hereby move the court to dismiss the appeal in this cause for the reason that the decree appealed from was not a final judgment, and therefore not one

from which an appeal might be taken according to law.

The decree in this case was an award of damages in favor of each of the libellants and intervenors in a fixed sum to each, with a direction that the vessel libelled be sold and the proceeds be paid into the registry of the court, but by its terms, the decree reserved other material issues in the case for further determination by the court.

(1) After fixing the amount of the appellees' several recoveries the decree provided—

"And it is further ordered that the claim of the intervening libellant, C. Hennigar, be reserved for such judgment or order as the court may deem just upon such further hearing as may be had upon the issues herein." (See Decree, Trans. pp. 405–407, Record p. ——.

C. Hennigar mentioned was a libellant who had lawfully intervened in the cause with leave, by the filing of his libel and stipulation for costs before default entered (See Trans. pp. 12–13, 14 and 404, and Record p. ——.

The claim of Hennigar was for repairs made subsequent to the original libellant's claims, and he sought priority over them. A stipulation signed by appellant's proctors as well as the proctors for appellees, was entered into in relation to the Hennigar libel as follows:

"It is hereby stipulated that the libel on account of repairs herein originally filed, shall stand herein as undetermined and an existing libel herein, and that the present owners of said claim for repairs shall, if they so desire, amend said libel and substitute for the original libellent, the present owner of said claim for repairs (Dated) November 30, 1897." (See Trans., p. 440, R. p.——

(2) And further, the decree appealed from did not make any distribution of the funds to come into the registry of the court or establish the priorities between the libellants and intervening libellants, but by its terms, the decree expressly reserved the matters of distribution and priority for the further judgment of the court. The decree in that respect provided—

"That the marshall shall pay the proceeds arising from such sale, after deducting the costs and expenses thereof, into the registry of this court, there to await the further order of the court in the premises as to the distribution of the same." (See Trans. p. 405-7.)

It is plain therefore from an inspection of the decree itself that the court below, in entering the judgment appealed from, did not complete its decretal action in the case, but expressly reserved the cause for the decision and determination of further questions between the parties from the decision of which future appeals might lie, namely:—

First—The question of the validity and amount of the undetermined libel of Hennigar, and,

Second—The question of priority between the different libellants and intervening libellants and the distribution of the funds, as well as the adjusting of costs.

Leaving either of these questions open for future decision, the decree would not be final and therefore not appealable, for there can be but one appeal in a cause.

The test of a final decree is stated by Chief Justice Waite to be as follows:—

"That judgment is final for the purposes of a writ of error to this court, which terminates the litigation be-

tween the parties on the merits of the case, so that, if there should be an affirmance here, the courts below would have nothing to do but to execute the judgment already rendered. If the judgment is not one which disposes of the whole case on the merits, it is not final."

Bostwick vs. Bunkerhoff, 106 U. S., 3.

The judgment here appealed from does not answer this definition, for if it should be affirmed, the court below would have still to determine on the other libel pending, on the matters of priority and distribution. From an error of judgment on these questions, a further appeal would lie.

"Where the district court of the United States, sitting in admiralty, decreed that a sum of money was due, but *the amount to be paid was dependent upon other claims that might be established*, this was not such a final decree as would justify an appeal to the supreme court." (Syllabus.)

Montgomery vs. Anderson, 21 How., 386.

And in the same case the court in its opinion says:—

"Under the act of Congress, no appeal would lie from the district to the circuit court until there was a final decree upon the whole case, that is, *not until all the claims on the money in the registry had been ascertained and adjusted* and the whole amounts of the proceeds of the sale *distributed* by the decree among the parties which the district court deemed to be entitled, according to their respective *priorities*."

Montgomery vs. Anderson, supra.

In the case of *Mordeci vs. Lindsay, 19 How., 199*, where the district court found in favor of libellants, but referred the matter to the clerk of the court "to ascer-

tain the charges to be made against the respective parties to the suit," it was held not to be a final decree.

"A decree setting aside a transfer and ordering a reference to ascertain amounts and priorities of creditor's claims, is not final within the rule."

Talley vs. Curtain, 7 C. C. A., 1.

"A decree awarding a certain rate of salvage of the proceeds is not a final decree, but at most only an interlocutory decree in the nature of a final decree," and in the opinion Judge Story said:—"It was interlocutory in its character for many purposes. It directed that *the charges and expenses of keeping and selling the property and the fees and charges of the officers of the court* to be first deducted from the proceeds of the sale. Now the exact amount of these charges and fees were not ascertained and were necessarily open to further inquiry, and might become matters of controversy between the parties in which they might have the right to take the opinion of the court."

The Steamboat New England, 3 Sumner, 495.

"In the district court the libel was dismissed and the damages against the captors. There had been a reference to a commissioner to ascertain the amount of the damages and before the report of the commissioner had been acted upon, the appeal was taken," * * * Chief Justice Marshall said: "The court has had the question submitted in this cause under consideration, and is of opinion that the appeal is not well taken. The decree of the district court was not final in the sense of the act of Congress. The damages remain undisposed of, and an appeal may still lie upon that part of the decree awarding damages."

The Palmyra, 10 Wheat., 502.

Benedict's Admiralty (2d ed.), page 345, lays down the law in respect to what decrees in admiralty are final so as to be appealable, as follows:

"The final decree is not that which decides upon the substantial merits of the case, but that which completes the decretal action of the court. If, therefore, there remain to be made any order,—for costs,—for confirmation of a report,—for distribution, or other order which is but a consequence of the decree on the merits, the appeal cannot be entered until such order is made; that is the final decree; not till then is it in a state for execution without further action of the court below."

And in Henry's Admiralty Jur. and Pro., p. 391, it is said:

"A decree in favor of libellants for an ascertained amount payable out of a fund arising from the sale of a vessel, but the amount payable in the decree depended upon the ascertainment of other claims upon the same fund and not adjudicated, is not a final decree and no appeal will lie until all the claims on the money in the registry have been adjudicated, and a final decree of distribution has been entered, adjudging the respective priorities and rights of the parties entitled."

Under the authorities we respectfully submit to the consideration of the court that the decree in this case was not a final judgment from which an appeal would lie, and this appeal ought, therefore, to be dismissed.

BRIEF ON THE MERITS.

STATEMENT OF THE FACTS.

We are not satisfied with the statement of the facts contained in the appellant's brief. It is a very partial and incorrect summary of the case as presented by the record.

The trial court made no special findings of fact in the case but a general finding only, that all the allegations of the amended libel were sustained and proven by the evidence. The appellant made no request for special findings on any of the issues.

No bill of exceptions was ever prepared or settled, nor indeed is there any exception whatever in the record save only the general one noted at the foot of the decree that "Claimant Joel P. Geer excepts and his exception is allowed." (See Trans. P. 407.)

The rule of proceedure of this court, therefor, on appeals in admiralty becomes important, for if the practice of the Supreme Court prevails, this court cannot do otherwise than to dismiss the cause and affirm the judgment of the lower court; but if it is the rule of the old circuit courts prior to the creation of the circuit courts of appeal, then they may sift and weigh the evidence *pro* and *con*.

In the Fifth Circuit, (The Beeche Dene, 5 C. C. A. 208) it is held that the practice on appeals in admiralty

to the circuit court of appeals, is "like the supreme court practice." But in two of the other circuits (The Philadelphian, 9 C. C. A. 54, The Havalah, 48 Fed. 684) it is held differently, but neither of these last two authorities go so far as to hold that the circuit court of appeals will re-examine and weigh the whole of the evidence where there is no bill of exceptions settled, and where there is no special findings of fact.

As the record stands in this case, this court could not review the facts under the practice of the Supreme Court, for it is there held (The Abbotsford, 98 U. S. 440), that "The findings of facts by the circuit court in admiralty is conclusive; and only rulings on questions of law can be reviewed by bill of exceptions. * * * The decision of the court below in this respect is as conclusive as the verdict of a jury when the case is brought by writ of error."

> *See, also, The Benefactor, 102 U. S. 214, and The Sylvia Handy, 143 U. S. 515.*

In a court like this, where the volume of business must be large and the labor great, it would seem to be a salutory rule to require that the issues be narrowed by the settlement of a bill of exceptions or the entry of special findings, instead of throwing the whole case open to inquiry as to all of the facts as well as the law. But should the court be of opinion that it is bound to weigh the evidence and make its own findings, then we respectfully submit that the following facts are proven:

1. That the Portland & Alaska Trading and Transportation Co., with whom appellees contracted, were the

owners of the vessel *pro hae vice*, with full authority to bind the vessel to the appellees for the fulfillment of their contracts; that this company had full possession of the vessel and manned and victualled her, and controlled her navigation; that they held themselves out to appellees and to the world as owners in fact, and appellees had no knowledge or notice of claimant's interest in the vessel; that the vessel was not employed differently from the terms of the lease in contracting to carry appellees;

2. That the vessel had entered upon the performance of its contract with appellees; that the passage money had been paid; that the appellees surrendered themselves and delivered their baggage and goods into the charge of the agents and managing owner of the vessel in control of the expedition; that the vessel entered upon the voyage and proceeded out to sea several hundred miles and was compelled to abandon it only because of her unseaworthy condition;

3. That the abandonment of the voyage by the Eugene was due entirely to her unseaworthy condition and not to the perils of the sea or the act of God;

4. That the damages awarded to appellees were not excessive under the circumstances but fair and reasonable;

5. That the appellees Lyons, Cary and Knight were properly in the court below and were parties to the record in whose favor a decree might enter.

Instead of entering here into a review of the evidence establishing these facts, we will refer to the evidence

more at large in discussing the several points raised in appellant's brief in their order.

I.

It is contended first by appellant, that the charterers or lessees of the vessel (The Portland & Alaska Trading & Transportation Co.) could not by their contracts with appellees to carry them, bind the interest of the general owner in the vessel to the performance of these contracts. This raises a mixed question of law and fact. We will review the evidence briefly bearing upon this point:

FACTS.

(*a*) There is no question made by appellant but that the charterers had the full possession of the vessel, that they manned and victualled her, and controlled her navigation. The lease or charter party says that the owners "do hereby turn over the possession of the said steamer Eugene to the said Portland & Alaska Trading & Transportation Company." (See Appellant's Brief, p. 7.)

On page 195 of the transcript (Record, p. ——), the claimant Joel P. Geer testified:

"Q. When was the possession of the boat delivered to the McGuires, or the Portland & Alaska Trading & Transportation Company?

"A. I suppose they took possession as soon as they started from Portland with it. They had their own captain, Captain Lewis, had possession of her of course. I took her down to Astoria for him because he did not know the river very well.

"Q. They employed their own captain, crew and pilot?

"A. Yes sir.

"Q. Had full charge of the navigation of the vessel from that on?

"A. Yes sir; they had full charge."

The testimony of Jones, another part owner, was to the same effect. (See Trans., p. 201.)

(*b*) With the knowledge and consent of the claimant Geer, the Portland & Alaska Trading & Transportation Co. held themselves out to the world and to appellees, not as the charterers or lessees, but as the owners in fact of the vessel, and appellees dealt with them believing them to be the owners.

In the published advertisements, the Portland & Alaska Trading & Transportation Co. were always referred to as "the *owners* and managers" of the Eugene. (See Trans., libellants' exhibits "A" to "J.")

In the agreement with Davidge & Co. the Portland & Alaska Trading & Transportation Co. are again mentioned as owners in the following language: "Whereas the said Portland & Alaska Trading & Transportation Company, a corporation, are the managers and *owners* of the stern-wheel steamer Eugene, an American registered boat, etc." (See Trans., p. 108.)

Furthermore the libellants were all strangers on the Pacific coast, having recently arrived from the east. (See testimony of Jacobi and Ruff, pp. ———). The port of enrollment of the Eugene was Portland, Or., but the libellants dealt with her agents and representatives

at Seattle, Wash., which was not her home port, neither was it the residence of any of her owners nor of the charterers, the P. & A. T. & T. Co., which was a Portland corporation.

It is not pretended by appellant that the appellees had any knowledge or notice of the claimant Geer's interest in the vessel, or that they had knowledge of any facts that would put them on inquiry.

(*c*) But aside from the foregoing facts, appellant has expressly admitted that under the charter-party the charterers had the authority and right to employ the vessel in the very manner in which she was employed in entering into these contracts with appellees.

On pages 194 and 195 of the transcript the claimant Geer testified:

"Q. What they did then in relation to these passengers was no breach of the contract (charter-party) in itself; if nothing else occurred they had that right under the contract?

"A. I suppose they did. What do you mean, *the right to transport passengers in the way they did?*

"Q. Yes sir, as far as they had gone, or farther, if the expedition had been successful; but the breach of the contract that you claim consisted in delays?

"A. *Yes sir, that is the breach of the contract that I claim, delays.*

"Q. And not the failure to deliver her there. You say you took the whole risk of getting her through safely?

"A. I took the risk myself of the boat in case of rough weather or anything.

"Q. You say it was an experiment?

"A. Well I claim it was an experiment on my part.

"Q. And you took the chances of the result?

"A. I took the chances of getting the boat up there in the first place."

Francis B. Jones, the other part owner with claimant, on page 201 of the Transcript, testified--

"Q. Mr. Jones, it was understood with the McGuires (the P. & A. T. & T. Co.) that the Eugene would have to be towed through by some other vessel?
"A. Either towed or conveyed in some way.
"Q. And it was talked of that the vessel would take passengers, was it not?
"A. Yes, sir.
"Q. Even before the agreement (charter- party) was signed?
"A. Yes, sir.
"Q. You mean a steamship to take passengers?
"A. Yes, sir.
"Q. And if towed to St. Michaels there the passengers would be transferred to her—now the whole arrangement was talked over and that was the very purpose of their getting possession of the Eugene?
"A. *Yes, to handle passengers and freight.*"

Here is an admission that the vessel was not employed contrary to the terms of the charter-party.

(*d*) The claimant Geer was on board the Eugene. when this very voyage was undertaken and remained on board during the whole of the trip up to the time of its abandonment, and knew all that was being done with the boat and made no protest. (See testimony of Geer, Trans., p.——)

(*e*) F. B. Jones, the joint owner of the Eugene with claimant, was also one of the incorporators of the Portland & Alaska Trading & Transportation Co., and was therefore an actual party to the contracts of that company made with appellees. (See Trans , p. 191 and 192, Testimony of Jones.)

AUTHORITIES.

Upon this state of facts the court ought to hold with the court below that the relation of the P. & A. T. & T. Co., the charterers to the Eugene, was such as to bind the vessel to a performance of the contracts entered into with the appellants. It clearly brings the case within the settled rule of law that wherever the general owner charters or leases a vessel, giving to the charterer or lessee the possession of the vessel and control of her navigation, the latter is deemed to be the owner of the vessel for the purpose of binding her to a performance of all contracts made by him in that behalf.

"*The charterer* of any vessel, in case he shall man, victual and navigate her at his own expense or by his procurement, *shall be deemed the owner* of such vessel within the meaning of the provisions of this title, * * * and *such vessel when so chartered shall be liable in the same manner as when navigated by the owner thereof.*"

R. S., Sec. 4286.

"If the general owner has allowed a third person to have the entire control, management and employment of the vessel, and thus become owner *pro hac vice*, the general owner must be deemed to consent that the special owner or his master may create liens binding on the interest of the general owner of the vessel as security for the performance of *contracts of affreightment.*"

The Freeman, 18 How. 182.

"Where the general owner allows the charterers to have the control, management and possession of the vessel and thus to become the owners for the voyage, he must be deemed to consent that the vessel would be

answerable for necessary repairs and supplies furnished at a foreign port for the prosecution of the voyage."

The India, 16 Fed. Rep. 262.

"Under the charter of a steam vessel by which the charterer becomes the owner for the voyage and charged with her navigation, the *agent of the charterer* can bind the vessel for coal necessarily furnished to her in a foreign port, although the person furnishing the coal knew of the charter, and knew that according to its terms, the charterer was bound to furnish coal for the voyage."

The City of New York, 3 Blatchford, 187.

II.

The second point raised by appellant is that the contracts with appellees were executory only and therefore the jurisdiction of admiralty did not attach and the vessel could not be held on a proceeding *in rem.*

This presents to the consideration of the court purely a question of fact, for appellees do not contend, and did not in the court below, that a proceeding *in rem* will lie against a vessel to recover damages for the breach of a purely executory contract, but by an examination of the evidence in the case this court must be convinced, as the court below was convinced, that these contracts were not executory but that performance had been entered upon. Indeed, it would seem to be but trifling with the time of the court, to urge that the contracts were executory only.

And the court below nowhere held that a proceeding *in rem* would lie upon a purely executory contract. The original libels filed herein failed to allege that

performance had been entered upon, (an allegation that was supplied in the amended libels), and claimant excepted to the original libels on this ground. The court below sustained the exceptions on that ground and delivered a written opinion in making its ruling. (See Trans. p. 26 to 30). In its ruling there the court went to the greatest possible length of the law in Claimant's favor, holding that rights *in rem* did not attach by the payment of the passage money—a holding which is not directly supported by any previous decision. Yet notwithstanding these extreme views of the trial Judge upon the rule of the admiralty law as to executory contracts, still upon the amended libels and the proofs offered at the trial, he found that the contracts were not executory, but were partially executed and performance had been entered upon. This is a question of fact to be determined.

Now appellant cites in support of his position that the court below ought to be reversed, this very decision of Judge Hanford's, (the trial Judge), in this very case and on the very point raised by appellant. (See Appellant's Brief p. 31). It is certainly a most strange thing that an appeal should be taken from the decision of a court and that the opinion given by that court in rendering its decision, should be cited and relied on by the appealing party as an authority in law for the reversal of that very decision, as is done by appellant here. At the least this goes to show that the appellant is satisfied with the rule of law applied to the case by the court below, and that the grievance complained of is really against the facts found.

The following is a brief summary of the facts bearing upon this branch of the case:

In July, 1897, Joel P. Geer and Francis B. Jones, the then owners of the Steamer Eugene chartered that vessel to the Portland and Alaska Trading and Transportation Company, a corporation at that time newly organized, and of which said Francis B. Jones was one of the corporators and interested.

The Eugene at that time was a steamer registered at Portland, Or., her home port, and all of the parties to the charter were residents of Portland.

Geer and Jones afterwards incorporated under the name of the Yukon Transportation Co., and transferred the Eugene, subject to the charter, to that company, as manager of which company Geer defended this action in the lower court and prosecutes this appeal here.

Immediately on the making of the charter-party, the Eugene was delivered over to the charterers, the P. & A. T. & T. Co., which company took full possession of her, spent a large sum of money in overhauling and repairing her, and employed their own crew, captain, pilot, furnished the provisions and had full charge of her navigation.

The Eugene was chartered to the P. & A. T. & T. Co., for the purpose of engaging in the Alaskan transportation business.

Thereafter and about August 15th, the P. & A. T. & T. Co. placed an agent at Seattle, Wash., to sell passage on the Eugene expedition from Seattle to Dawson City, N. W. T., to all persons desiring the same to the number of 300.

Extensive advertisements of the Eugene expedition were circulated and sent out at Seattle, in the form of bills and posters, and long and graphic descriptions of the trip published daily in the daily papers of Seattle. (See Trans., libellants' exhibits "A" to "J.")

In these advertisements the Portland & Alaska Trading & Transportation Company held themselves out as

"*the owners and managers*" of the Eugene, and no suggestion that they were charterers.

The expedition was advertised to leave Seattle on August 24th, and a guarantee was published that all passengers engaging passage would be landed at Dawson City, N. W. T., not later than September 15th, 1897, and before the freezing of the Yukon river.

The advertisements were of the most alluring and lavish character in their praise of the seaworthy condition of the Eugene, the experience of her captain and pilot and their knowledge of Alaskan waters, as well also as of the accommodations that would be afforded passengers.

The rate to be paid by each passenger was fixed at $300.00 for the full trip from Seattle to Dawson City, and passengers were allowed to take 1500 pounds of baggage and outfits.

The P. & A. T. & T. Co., charterers, engaged the S. S. Bristol of Victoria, B. C., to tow the Eugene to St. Michaels at the mouth of the Yukon river. (See Trans., p. 108.)

E. B. McFarland, the general manager of the Portland & Alaska Trading & Transportation Co., was to accompany the expedition, and did in fact accompany it, in full charge and control of the passengers and their effects.

The libellants, strangers in Seattle lately from the eastern states, relying on the published advertisements, bought passage on the Eugene expedition from Seattle to Dawson City, paying three hundred dollars each; they dealt with the P. & A. T. & T. Co. through its Seattle agent, and its president, H. P. McGuire, and secretary, W. W. McGuire. The passage money was paid in a lump sum direct to this company, the charterers of the Eugene, and at the same time the substance of the published advertisements was repeated to them by the agent and the two McGuires.

They were told to deliver their baggage and outfits at the "Yesler Wharf," in Seattle, marked "In care of

S. S. Eugene," and at that point this company would assume control of them.

They delivered their goods according to instructions at this wharf, and there, H. P. McGuire, president of the company, and an agent of the company, took charge of it.

At this time the plans of the expedition were altered slightly; instead of leaving Seattle in tow of the Bristol, it was fixed that the Eugene would leave Victoria, in tow.

The passengers were told to present themselves at the Yesler wharf in Seattle, and free transportation, food and beds would be furnished them by the P. & A. T. & T. C., to Victoria to join the Eugene expedition at that point.

This was accordingly done; the passengers, including the libellants, presented themselves at the wharf in Seattle, and were there met by H. P. McGuire who took them in charge, assigned them to state rooms in the Victoria steamer, paid their passage, accompanied them to Victoria. On arriving at Victoria it was found that the Eugene had not yet arrived and would be delayed several days; whereupon McGuire took the passengers to a hotel where he arranged to pay their expenses to await the Eugene and the Bristol, and there McGuire turned over the charge of the passengers to E. B. McFarland, the general manager of the company, and in whose charge the passengers after remained. The passengers were repeatedly assured by both McGuire and McFarland that the baggage and outfits of the passengers were under the care and control of the P. & A. T. & T. Co., and all the details of the shipment had been attended to.

On the arrival of the Eugene and Bristol, the expedition started, under the management and control of McFarland. The Bristol took the Eugene in tow in Victoria harbor. The passengers themselves were put on board the Bristol, but were on and off the Eugene at will at different places on the voyage.

The two vessels, the Eugene in tow of the Bristol, continued the voyage for several hundred miles up the coast. At Comox, a wayport, they stopped to take on coal, and there the baggage and outfits were shifted from one vessel to another, the libellants, Jacobi and Ruff testifying that portions of their outfits were seen by them on board the Eugene at this point, and they themselves were aboard of her.

After continuing on the voyage for a day or two longer, the Eugene broke down and was unable to go farther, and by request of E. B. McFarland, who was present with the passengers, and by request also of Capt. Lewis, captain of the Eugene, the expedition was turned back and the Eugene towed into a place of safety at Alert Bay, there to decide, by conference between the passengers and McFarland and the captains of the two vessels what further should be done.

The Eugene was there examined by a committee of the passengers in company with Captain Lewis, and all including Captain Lewis of the Eugene, pronounced the Eugene unseaworthy and unable to make the voyage; and thereupon E. B. McFarland, as manager of the P. & A. T. & T. Co., declared that the voyage was abandoned, and by a speech publically made to the passengers, laid the whole blame to the unseaworthy condition of the Eugene. Capt. Lewis of the Eugene was present and assented to and concurred in all that McFarland did. McFarland delivered the following written statement to the master of the Bristol: (See Trans. p. 118.)

ALERT BAY, Sept. 6, 1897.

Capt. James McEntyre, Commander S. S. Bristol:

SIR:—*In view of unseaworthy condition of Steamer Eugene rendering her unfit for voyage to St. Michaels*, even with repairs it is impossible to make with means available, and furthermore owing to the urgent request of a large number if not all of the passengers aboard the S. S. Bristol that said S. S. Bristol return to Victoria, B. C., in consideration of which we hereby release and absolve said S. S. Bristol, etc."———

"Furthermore we hereby agree to indemnify and protect the S. S. Bristol and her charterers against any and all claims which the passengers on board said S. S. Bristol may make against said Bristol or her charterers by virtue of and under tickets which they held as passengers on S. S. Bristol and under shipping receipts for transportation of freight.

PORTLAND & ALASKA
TRADING & TRANSPORTATION CO.,
By E. B. MCFARLAND,
Vice Pres. and General Mgr."

Captain Lewis of the Eugene also wrote and delivered to the master of the Bristol, a request that the voyage be abandoned and the passengers carried back. (See Trans. p——).

The whole voyage was then abandoned, the Eugene was towed back to Victoria and there the passengers were left, and on the arrival of the Eugene at Seattle, these libels were filed against the vessel.

On this state of facts we think the court must find, with the court below, that performance had been entered upon by the Eugene and the contract was not purely executory as contended by appellant.

"The lien upon a vessel for the safe custody and transport of goods to be shipped in her attaches at the time of the delivery of such goods to her *agents or owners.*

Pearce vs. The Thomas Newton, 41 Fed. 106.

We quote below at some length from the opinion of the court in the case of Pearce vs. Thomas Newton, above cited, because it is a review of the principal authorities relied upon by the appellant here in his brief:

"It is contended that the injuries were received before the goods reached the vessel, and therefore no action *in rem* lies. The proposition laid down in claimant's brief, and for which he cites many authorities, is admitted. It is:

'No lien on a vessel lies until a lawful contract of affreightment is made, and a cargo shipped under it.'

The words are used in numerous cases of authority. The fallacy lies in an incorrect meaning attached to the word 'shipped.' The sentence is in substance to be found in the opinion of the supreme court in the *Freeman vs. Buckingham, 19 How. 182*, cited in claimant's brief, and is used with little variation of phrase in *Vanderwater vs. Mills, 19 How. 82*, and *Pollard vs. Vinton, 105 U. S. 7–12.* In all these cases the question was whether there was a contract of affreightment. In the *Freeman vs. Buckingham*, the master had given a bill of lading for goods never shipped, and an assignee had libelled the vessel. In *Vanderwater vs. Mills* the owners of the libelled vessel had made a contract to carry freight from a certain port to another, but had never set their vessel to the proposed port of shipment. In neither case had any goods been delivered to the master of the vessel *or its agents.* In *Pollard vs. Vinton, 105 U. S. 7–12*, Miller J., says:

'Before the power to make and deliver a bill of lading could arise, some person must have shipped goods under it. * * * In saying this *we do not mean that the goods must have been actually placed on the deck of the vessel. If they come within the control and custody of the officers of the boat, for the purpose of shipment the contract of carriage had commenced.*'

The case of *Bulkley vs. Cotton Co., 24 How. 386*, is one in which no lien could have been enforced; did the word 'shipped' bear the interpretation contended for. The Bark Edwin, lying below the port of Mobile, had contracted to carry 707 bales of cotton to Boston, and the injury to the goods for which she was libelled happened by the explosion of the boiler of a steamboat employed to carry them from the wharf to the Edwin, and

before they reached the bark. Nelson, J., says in delivering the opinion of the supreme court:

'The unloading of the vessel at the port of discharge, upon the wharf, or even the deposit of the goods in the warehouse, does not discharge the lien; * * * and we do not see why the lien may not attach when the cargo is delivered to the master for shipment, before it reaches the hold of the vessel.'

To the same effect is The Oregon, Deady 179, affirmed in the Circuit Court on Appeal by Field, J."

See Pearce vs. The Thomas Newton, supra.

In *Bulkley vs. Cotton Co., 24 How. 386*, it was held that the lien on the vessel would attach upon the delivery of the goods to a lighter employed by the vessel, and the court in its opinion said:

"The argument urged against the lien of the shipper seems to go to the length of maintaining that in order to uphold it there was a physical contact between the cargo and the vessel, and that the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but in a general sense, and as applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo. But this is obviously too narrow and limited a view of the liability of the vessel. *There is no necessary physical connection between the cargo and the ship as a foundation upon which to rest this liability.*"

"Where an ocean steamer is making regular voyages to port, and for any reason she is unable to reach such port, and the agent of her owner charters a steamboat to take the passengers and freight down the river to such steamer and bring back her cargo, a delivery of the goods under such circumstances to the steamboat for the purpose of being conveyed to the steamer, is a delivery to the latter and she is thenceforth bound."

The Oregon, Deady, 179.

"It does not require physical contact between the cargo and the ship to create the lien, nor does the mere unlading of the merchandise on the wharf or even in the warehouse discharge the lien, but *a constructive possession* is sufficient to support it."

Henry's Adm. Jur. & Pro., p. 180.

"Delivery to a carrier should be according to the usage of the business and is either actual or constructive; and the delivery is complete if the master, mate, *or other agent of the owner*, receives them at the ship or on the *wharf* or in the *warehouse*."

2 Parson's on Contracts, pp. 175, 6, 7.

A vessel carrying passengers for hire stands on the same footing of responsibility as one carrying merchandise, the passage money in the one case being equal to the freight in the other.

The Moses Taylor, 4 Wall., 411.
The Abeffoyle, 1 Blatch., 360.

"There is no difference in point of law between common carriers on land and common carriers by water." (Judge Story.)

King v. Shepherd, 3 Story, 349.

"A general ship is a common carrier."

The Saratoga, 20 Fed., 869.

"If there is an agreement that property intended for transportation by a carrier may be deposited at a particular place without express notice to the carrier, such deposit without notice is a delivery. The acceptance by the carrier is complete and his liability fixed when ever property thus comes into his possession."

Pratt vs. R. R. Co., 95 U. S., 43.

The appellees in this case had performed the contracts on their part as far as it was in their power. They paid the passage money in full; they delivered their goods to the officers of the company, and surrendered themselves into the control of the manager of the expedition and the captain of the vessel, and they departed on the voyage.

Nelson, J., the distinguished admiralty judge, held in an elaborate opinion, that the payment alone of the passage money by a passenger was such a performance of the contract in itself, that a lien upon the vessel would attach in his favor from payment of the passage money alone.

The Pacific, *1 Blatch.*, *569.*

The authority of *The Pacific* is recognized in the case of *The City of Baton Rouge*, *19 Fed.*, *461*, where it is said that the payment of the passage money is so far a performance of the maritime contract in itself, that the jurisdiction of admiralty attaches.

And in the case of *Scott vs. The Ira Chaffee*, *2 Fed. Rep.*, *404*, cited in Appellant's brief and relied on as a leading case in favor of his position here, the court, commenting on the case of *The Pacific* in the *1 Blatch.*, says,—"But it would seem that the decision there "might also be sustained upon the ground that the "libellant himself had partly performed his contract *by* "*the payment of the passage money*, and his preparations "for settlement in California. *I do not deem the case* "*inconsistent with the other authorities* which hold that

" in cases of purely executory contracts the libellant
" cannot proceed against the vessel."

But in the present case there had been an entry upon performance, and a part performance by the vessel herself.

III.

The third point made by appellant in his brief is, (1) that the abandonment of the voyage by the Eugene was due to the bad weather encountered, and (2) that the whole expedition was but an experiment. For these reasons it is claimed that the Eugene was released from liability.

No more than the ordinary weather of that region was encountered on the voyage. There was a stiff wind but no witness on the stand in the whole case said there was a storm. The whole evidence shows clearly that the abandonment of the voyage was due to the unseaworthy condition of the Eugene.

As to the matter of its being an experiment, it is certainly a strange claim that one can enter the business of a common carrier and after making default and failure upon his contracts to carry, make a good answer to the injured party by saying the business was an experiment. Common reason and the law are against this.

" Whoever undertakes the business of a common carrier of persons is bound to know the hazards to which it is exposed."

Saltonstall vs. Stockton, *Taney's Rep.*, *11.*

IV.

The fourth point raised by appellant's brief seems to us to be but a repetition in another form of the same question raised in the second point and there discussed in this brief. It is idleness to say, in the face of the evidence, that no breach of the contracts to carry was shown.

V.

It is insisted by appellant that the sum of $800 damages awarded to each of the libellants was excessive, but we think that on a review of the evidence the court will be satisfied that the amount is not unreasonable.

The libellant Ruff was a machinist and mechanical engineer, and before going on this trip, was foreman in a large manufacturing plant; Jacobi testified that he was capable of earning from $5 to $10 a day at his trade on contract work.

But the hardships and perils they were exposed to is an element to be considered in fixing damages, and the disappointment in not reaching their destination at all, and necessitating their waiting over another year to make the trip.

All things considered, the damages allowed were low and by no means excessive or unreasonable.

VI.

The last point raised by appellant is that, as to the intervening libellants, Lyons, Knight and Cary, they were never in court at all, and the court had no jurisdiction to render any judgment whatever in their favor.

On November 6th, 1897, the intervening libellants, Lyons, Knight and Cary, prepared and delivered to the clerk of the court below, their libel in intervension.

(See printed Record, p. 360 to 367.)

On application an order of court was made below granting leave to file intervening libel, and the following order was endorsed thereon:

"Upon motion of proctors for libellants made in open court, leave to file the foregoing intervening libel is hereby granted; four days to answer.

"Nov. 6, 1897. C. H. HANFORD,
Judge of said Court."

(Printed Record, p. 366.)

On November 5th, this intervening libel of Cary, Lyons and Knight, was duly served on proctors for claimant, and their admission of service endorsed as follows:

"Service of the within paper on the undersigned this 5th day of November, 1897, is hereby admitted.

WILLIAMS, WOOD & LINTHICUM, and
STRUDWICK & PETERS,
Attorneys for Claimant."

(Record, p. 366.)

The clerk of the court below made the following endorsement upon the libel:

"Intervening Libel of Walter M. Carey, et al. presented and offered for filing in my office, and fee for filing paid to me, Nov. 6, 1897, but withheld from filing awaiting stipulation for costs.

R. M. HOPKINS, *Clerk*,
By H. M. WALTHEW, *Deputy*."

(Record p. 366 67).

On Nov. 20th, thereafter, a stipulation was entered into between the respective proctors for the libellants,

the claimant and the intervening libellant, in the following words:

"It is hereby stipulated and agreed by and between the parties to the above entitled action, that upon the filing of this stipulation the above cause may be set down for trial by the court so as to be tried on the 27th day of Nov. 1897, as early a date thereafter as the court may fix.

It is further stipulated that *the cause, as to the intervening libellants herein, shall be submitted and tried* at the same time as the principal cause and shall abide the issue therein; that *the answer* of the claimant herein *shall stand as the answer to the intervening libel*, and *all evidence* introduced in reference to libellants Jacobi and Ruff, *shall be considered as applying also to intervening libellants;* and all evidence on behalf of claimant shall be considered against said intervening libellants.

Nov. 20, 1897. (Signed)

STRUDWICK & PETERS and
WILLIAMS, WOOD & LINTHICUM,
Proctors for Claimant;
JOHN C. HOGAN,
Proctor for Libellant;
PATTERSON & EASLY,
For Intervening Libellant and for Libellant."

(Record p. 368 and 369.)

Cary, Knight and Lyons were considered as parties to the cause throughout the taking of the testimony. (See Record p. 175.)

The decree of the court in relation to the intervening libellants provided:

"And a stipulation having been duly entered into and filed in this cause by the respective parties, wherein it

is stipulated and agreed that the intervenors, Fred M. Lyons, Walter M. Cary and Edward J. Knight shall abide the result of the trial of the issues between libellants and claimant herein, and shall be entitled to the same recovery, * * * It is ordered, etc.

(See Record p. 307-8.)

Appellant fails to point out in his brief on what grounds he bases his conclusion that the intervening libellants, Cary, Knight and Lyons were not before the court below as parties, but we assume that it is because of their failure to file a stipulation or bond for costs below.

We concede that no bond for costs on behalf of such intervenors was filed, but this was a mere irregularity which the appellant waived below.

Appellant never raised the objection in the court below that no bond for costs by the intervenors was given. Had this been done the court below would no doubt have directed the bond to be entered into and on default of the same, dismiss the intervening libel. But appellant chose to deal with the intervenors, by putting in an answer to the intervening libel (or what was the same thing, agreeing that the answer to the principal libels, should stand also as an answer to the libels in intervention), and by stipulating with the intervenors to abide the result of the trial on the libels in chief.

It is true that in admiralty, anything going to the jurisdiction of the court over the *subject matter* cannot be waived by the parties, but one merely affecting the personal rights of a party in a matter of procedure, is waived unless objection is made.

That a bond for costs in admiralty is waived unless objection be reasonably made, see

Polydon vs. Prince, Ware, p. 402.

"If a claimant is admitted without objection (that no bond is filed) and allegations or pleadings on the merits are subsequently put in, it is an admission that the claimant is rightly in court and capable of contesting on the merits."

Henry's Ad. Jur. & Pro., p. 341.
U. S. vs. 422 Casks of Wine, 1 Peters (Supreme Court), 547.

In this case the answer of the appellant to the libel of the intervenors, by stipulation, was an admission on his part that the intervenors were properly before the court.

Ganes vs. Travis, Abb. Adm. 297.

In rendering its decree the court followed the agreed terms of the stipulation between the parties, then on appeal taken, the appellant for the first time raises the objection that no bond had been filed by the intervenors with whom before he stipulated. It would seem that the objection comes too late.

On the whole case, we respectfully submit that the court below committed no error, and that its judgment ought to be affirmed.

Respectfully submitted.

JOHN C. HOGAN AND
PATTERSON & EASLY,
Proctors for Appellees.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE STEAMBOAT EUGENE, GASTON JACOBI and CHARLES RUFF,
Libellants and Appellees,

JOEL P. GEER, *Claimant and Appellant,*

WALTER M. CARY, FRED M. LYONS and EDWARD J. KNIGHT,
Intervenors and Appellees.

PETITION FOR REHEARING

JOHN C. HOGAN AND
PATTERSON & EASLY,
Proctors for Appellees.

SEATTEE, WASHINGTON.

BOWMAN & HANFORD S. & P. CO., SEATTLE

FILED
MAY 2 8 1898

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE STEAMBOAT EUGENE, GASTON JACOBI and CHARLES RUFF,
Libellants and Appellees,
JOEL P. GEER,
Claimant and Appellant,
WALTER M. CARY, FRED M. LYONS and EDWARD J. KNIGHT,
Intervenors and Appellees.

PETITION FOR REHEARING.

The appellees herein respectfully petition the Court for a rehearing and in support of said petition say:

That the uncontradicted evidence in this case shows, that the Eugene and the Bristol were to make the trip from Victoria to St. Michaels together, the Eugene in tow of the Bristol, and that the vessels started in this manner

and proceeded about 600 miles on the voyage, when the voyage was abandoned on account of the unseaworthy condition of the Eugene. In the trial Court two cases were cited and relied upon which by oversight were omitted from the original brief, and upon a point which was also one of the principal points argued in the case below.

From the foregoing Statement of Facts we contend that the Bristol and the Eugene were in law, one ship. In the case of *The Civilta and The Restless*, *103 U. S. R.*, *699*, it was decided that a tug and ship in tow, were in law but one vessel. If this is the law then the Bristol with the Eugene in tow, when they started on the voyage to St. Michaels were but one vessel, and if the goods and passengers were on either vessel they had a lien against either one or both of the vessels. The question whether the appellees' goods and the appellees themselves were on one or the other of the vessels constituting the combined vessel would be as immaterial as the question whether their goods were on the deck or in the hold of the vessel. The Eugene was a part of the vessel and she is liable just the same as any other portion of either vessel or of their apparel or tackle would have been. The goods and passengers were on board the combined vessel and the vessel that furnished the motive power and the Eugene in tow were a part and parcel of the whole affair and each part was liable for breach of contract.

The case of the *Wm. Murtagh*, *in 17th Fed. Rep.*, *259*, is very similar to the one at bar. In that case the

tug Wm. Murtagh was towing the barge A. Servis loaded with coal and the barge on account of her unseaworthiness sank and the owners ot the coal libeled the tug for the value. Tha coal belonged to one person; the sunken barge to another; and the tug to another. It was held (opinion by Justice Brown) that the owner of the tug and tow, both concurring in the trip, should be held liable, and that the owner of the coal was entitled to a lien against the tug for the full amount. No part of the coal was ever on board the tug, but nevertheless the tug was held responsible as a part of the expedition.

Upon the authority of these two cases it is respectfully submitted that in the case at bar the Eugene was a part of this expedition; the owners of the Bristol and the Eugene were both concurring in a common expedition, and for the purpose of this expedition the two boats were one. The object and purpose of this expedition were to take the passengers and baggage and the Eugene herself to the port of St. Michaels. This combined expedition failed and why is not a separable and integral part of this combined expedition (the Eugene) answerable for the results of failure? Had the Bristol steamed away by herself with the freight and passengers and the Eugene followed at another time with neither freight nor passengers the opinion of the Court would cover the case. But they went tied together as one boat. If they were tug and tow and one vessel it is difficult to escape from the conclusion that any part of that vessel is liable. The lien in admiralty, where it

exists, binds the whole ship, her furniture, apparel and tackle. If the Bristol and Eugene had both been in the jurisdiction of the Court they would have both been liable. If the Bristol alone had been here she would have been liable; if one of her life boats had come into the jurisdiction it would have been liable. The Eugene herself was but a part of the combined boat, and she too, it appears to us, should be liable.

For these reasons we respectfully urge that in a case so important to the appellees the Court will grant us a rehearing.

Respectfully submitted,

JOHN C. HOGAN AND
PATTERSON & EASLY,
Proctors for Appellees.

We the undersigned Proctors for Appellees herein do hereby certify, that in our judgment the foregoing petition for rehearing is well founded in law and fact, and said petition is not interposed for delay.

JOHN C. HOGAN AND
PATTERSON & EASLY.

No. 441

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

FRANK C. ROBERTSON,

Plaintiff in Error

vs.

BLAINE COUNTY,

Defendant in Error

TRANSCRIPT OF RECORD.

Error to the Circuit Court of the United States for the District of Idaho, Central Division.

FILED

APR 1 1 1908

INDEX.

page.
Acceptance of Service of Bill of Exceptions 69
Acknowledgment of Service 21
Amended Complaint 36
Assignment of Errors 71
Bill of Exceptions 66
Bond on Writ of Error 72
Citation 74
Clerk's Certificate to Judgment Roll 64
Clerk's Certificate to Transcript 77
Complaint 1
Decision on Demurrer 23
Demurrer 22
Demurrer to Amended Complaint 61
Judgment 63
Motion to Strike Out Amended Complaint, and Withdrawal of Motion 34
Notice of Motion to Strike Out Amended Complaint 33
Order Sustaining Demurrer to Amended Complaint 62
Petition for Writ of Error 70
Stipulation and Order Extending Time to File Bill of Exceptions 65
Stipulation to Amend Complaint 20
Writ of Error 75

In the Circuit Court of the United States, in the District of Idaho, and in the Central Division thereof.

FRANK C. ROBERTSON,
Plaintiff,

vs.

BLAINE COUNTY,
Defendant.

Complaint.

This plaintiff, a resident of Miles City, State of Montana, and a citizen of said State, complains of said defendant, Blaine county, a county of the State of Idaho, and a public political corporation organized and existing under the laws of the State of Idaho, situate in the Central Division of the District of Idaho, and complaining, avers:

I.

That this plaintiff is, and at the time of the commencement of this action, and at the several times herein mentioned was, a citizen of the State of Montana, domiciled therein.

II.

That the defendant is, and at and during all the times herein mentioned since March 5th, 1895, was a county of the State of Idaho, situate in the Central Division of the District of Idaho, and was and is a body politic and corporate, organized and existing by and under the laws of Idaho, and as such has power to sue and be sued.

III.

That prior to, and from and after 1880, and continuously to March 5, 1895, there was in Idaho a certain county of Idaho, known, named, and being Alturas county, and that during all the times of its existence it was a body politic and corporate, a public political corporation and county of Idaho; that in 1883, and down to 1889, said Alturas county embraced within its borders all the lands and property in the territory of Idaho which now form all of said Blaine county, all of Lincoln county, all of Elmore county, and portions of Bingham, Bannock, and Fremont counties.

IV.

That the Legislature of the then territory of Idaho, by an act entitled, "An Act providing for the erection of a courthouse and jail at Hailey, the county seat of Alturas county," approved February 8, 1883, authorized and required the said county of Alturas to erect a county courthouse and jail at the town of Hailey, the county seat of said county, and for that purpose authorized and requir-

ed said Alturas county to issue forty thousand dollars in negotiable bonds, in denominations of five hundred dollars and one thousand dollars, bearing interest at the rate of six per cent per annum, payable January 1st of each year, and required that the principal of said bonds become due and payable November 1, 1891, and that said bonds should be registered and numbered, as will more fully appear by reference to said act; and said act provided that "The Board of County Commissioners of said county shall, at the time of levy of county taxes, include therein a levy of sufficient tax to meet the interest and principal of said bonds as the same shall become due, and the tax so levied shall be known as the Courthouse Bond Tax, and shall be collected as other taxes are collected, and shall constitute a separate fund, and shall be used for no other purpose. And for the payment of said bonds, principal, and interest, all the taxable property of said county is hereby pledged."

V.

That under and in pursuance of said act the principal officers of said Alturas county caused said courthouse and jail to be erected at said town of Hailey, and the same was so erected and accepted and used, and is still used by the defendant as a courthouse and jail.

VI.

That under the provisions of said act the Board of County Commissioners of said Alturas county secured the engraving and printing of said bonds, and placed the

same in the hands of the county treasurer of said Alturas county, who thereupon negotiated and sold the same, as required by said act, and not otherwise; and no expense whatever that was incurred in carrying out the provisions of said act and building said courthouse and jail was charged to or paid out of any funds other than arose from the sale of said bonds.

VII.

That said bonds are dated May first, 1883, and became due and payable November first, 1891, and that at the time they were negotiated they were numbered in two series—that is to say, the thousand dollar bonds were consecutively numbered in one series, and the five hundred dollar bonds were consecutively numbered in a distinct series, and they were payable to bearer at the office of the county treasurer of said county, at Hailey, the county seat of said county; bore interest at the rate of six per cent per annum, payable January first of each year, except the interest from January first to November first, 1891, which was payable at the maturity of said bonds; and a part of said bonds are in the denomination of one thousand dollars each, and the residue are in the denomination of five hundred dollars each, and each of said bonds expressed on its face the amount for which it was issued, when due, and the rate of interest, and was signed by the chairman of the Board of County Commissioners of said county, was attested by the clerk of said board with his seal, and was countersigned by the treasurer of said county, and by him numbered and register-

ed; and each of said bonds, when negotiated, had interest coupons attached, payable to bearer, whereby said Alturas county promised to pay to bearer the interest that should accrue on said bonds, as the same became due, as aforesaid; and each of said bonds, except as to the number thereof, which are consecutive, and the principal sum, which is either one thousand dollars or five hundred dollars, is in words and figures as follows, to-wit:

(United States)	(No. 19.)	(Territory)
(of America.)	Alturas County.	(of Idaho.)

COURTHOUSE BOND.

($500)

Know All Men by These Presents, that the county of Alturas, in the Territory of Idaho, acknowledges itself to be indebted, and for value received promises to pay to H. G. Knapp, or bearer, the sum of (five hundred dollars), lawful money of the United States of America, at the office of the county treasurer of Alturas county, at Hailey, the county seat thereof, on the first day of November, in the year of our Lord one thousand eight hundred and ninety-one, with interest thereon at the rate of six per cent per annum, payable annually on the first day of January, of each year at said county treasurer's office, upon the presentation and surrender of the annexed coupons for said interest, as they severally become due. This bond is executed and issued for the purpose of erecting a courthouse and jail at Hailey, in said county, and under the provisions and in pursuance of an act of the legisla-

tive assembly of the territory of Idaho, entitled "An Act providing for the erection of a courthouse and jail at Hailey, the county seat of Alturas county," and approved February 8th, A. D. 1883.

In testimony whereof, and in accordance with said act, the county of Alturas hereby pledges its full faith, credit, and property for the punctual payment of this bond and the interest thereon, as aforesaid, and has authorized the same to be signed by the chairman of the Board of County Commissioners of said county, attested by the auditor and recorder, ex-officio clerk of said board, with his official seal, and countersigned by the treasurer of said county, as witness their hands and said official seal affixed hereto at said county.

Executed at Hailey, the county seat of said Alturas county, this first day of May, A. D. 1883.

J. K. MORRILL,

Chairman of the Board County Commissioners of Alturas county, Idaho Territory.

Attest:

[Seal] C. B. FOX,

Clerk Board of Commissioners.

Countersigned:

J. M. BURKETT,

County Treasurer.

(On back of bond as follows:)

No. (19). Alturas County Courthouse Bond. ($500). Dated 1st May, 1883. Payable Nov. 1st, 1891. Interest 6 per cent per annum. Payable annually on the first day of January.

And the interest coupons attached to each of said bonds when they were negotiated, as aforesaid, were consecutively numbered from one to nine, bore the number of the bond to which they were attached; and except as to the numbers of the coupons, the number of the bond to which they were attached, and the date of payment, and the amount of the coupon, which was the amount of the interest due upon the bond at the maturity of the coupon, said interest coupons were in words and figures following, to-wit:

(No. 8.) ($30.00)

The County of Alturas, in the Territory of Idaho, will pay to bearer (thirty dollars), at the office of the county treasurer of said county on the (first day of January, A. D. 1891), being interest due at said date on bond (No. 19, Nineteen).

J. K. MORRILL,

Chairman Board of County Commissioners, Alturas County, Idaho Territory.

C. B. FOX,

Clerk of Board of County Commissioners.

Countersigned:

J. M. BURKETT,

County Treasurer.

That at time said bonds were so issued under and by the provisions of said act, J. K. Morrill was of the Board of County Commissioners the chairman and acting chairman of said Alturas county; that C. B. Fox was, at time said bonds were issued, the auditor, recorder, and clerk of Board of County Commissioners of said county, and

acting as such; that at time said issue of bonds was made J. M. Burkett was the treasurer and acting treasurer of said county, and that each of said persons signed and each executed and united in the execution and issue of said bonds, as the respective office of each required in the making, signing, executing, and issue of said bonds under the orders and directions of the then Board of County Commissioners of said Alturas county, and so doing and acting were respectively each performing the duties of their respective office, and were each and all fully authorized, empowered, and required to so make, sign, issue, and on behalf of said county execute and issue said bonds, as above set forth; and that said bonds were of the legal and valid indebtedness of said Alturas county from and after the issue of the same, during all the subsequent existence of said Alturas county, and until creation of Blaine county, and were so recognized by said Alturas county and the officers thereof, and subsequently by Blaine county and its officers, in all matters of suit, settlement, and of county affairs, down to time of bringing of this action; and that while said bonds and coupons were owned and held by the predecessors in ownership of plaintiff, the said interest coupons were paid as same became due, down to time coupons No. 7 became due, and that Blaine county recognized said indebtedness as a legal and valid obligation and debt legislated upon it, and promised to pay the same until the time of the institution of these proceedings, when it claimed that the indebtedness was barred by the statute of limitations; and no other defense has ever been set up or claimed on or against said indebtedness.

VIII.

That before maturity of said bonds, and before any of the coupons attached as aforesaid became due, six of said bonds, of the denomination of one thousand dollars each, and numbered in the series of one thousand dollar bonds, as No. 5, 6, 7, 8, 9, and 10, and six of said bonds of the denomination of five hundred dollars, and numbered in the series of five hundred dollar bonds, as No. 2 and 19, 37, 38, 39, and 40, amounting in all to the principal sum of nine thousand dollars (9,000), part of said bonded indebtedness of forty thousand dollars, with interest coupons for all the interest to accrue thereon up to the time of maturity of said bonds, thereto attached, were purchased and owned by a bona fide purchaser, for value, who was then a citizen and resident of the State of New York, and who thereafter removed to and became, and, as affiant is informed and believes, continues to be, a resident and citizen of the State of Washington, and who never was, and is not now, a resident or citizen of the State of Idaho, and who sold and delivered the same to the assignor and grantor of the same, for value, to this plaintiff, who is now the bona fide owner and holder of the bonds and coupons in this allegation described.

IX.

That no part of the principal of said twelve bonds hereinbefore particularly described, amounting to the sum of nine thousand dollars, as aforesaid, part of said bonded indebtedness of forty thousand dollars, has been paid, and the said sum of nine thousand dollars, besides

interest, became due thereon on the first day of November, 1891, and is now due, and was, at the commencement of this action, due, owing, and payable upon the said bonds above described and numbered from said defendant to this plaintiff.

X.

That of said coupons attached to said bonds when issued and negotiated, as aforesaid, coupons No. 7, due January 1, 1890, each for sixty dollars, interest for the year 1889; coupons No. 8, due January 1, 1891, each for sixty dollars, interest for the year 1890; and coupons No. 9, due at maturity of said bonds, November 1, 1891, each for fifty dollars, interest from January 1, 1891, to November 1, 1891, attached to and for interest on said one thousand dollar bonds; No. 5, 6, 7, 8, 9, and 10, respectively, of the series of one thousand dollar bonds; and coupons No. 7, due January 1, 1890, each for thirty dollars, interest for the year 1889; coupons No. 8, due January 1, 1891, each for thirty dollars, interest for the year 1890; coupons No. 9, due at maturity of said bonds, November 1, 1891, each for twenty-five dollars, interest from January 1, 1891, to November 1, 1891, attached to and for interest on said five hundred dollar bonds numbered 2, 19, 37, 38, 39, and 40 of the series of five hundred dollar bonds, at time it was issued and negotiated, amounting in the aggregate to the sum of $1,590 (besides interest from maturity) have not been paid (nor any part or portion of them), and the same are now, and were at the commencement of this action, due and owing upon said coupons from said defendant to this plaintiff, together with

legal interest thereon from the several times when said coupons were due, as aforesaid.

XI.

That said bonds and coupons were, as they respectively matured and became due, and at the several times they became due and payable as aforesaid, presented for payment to the treasurer of said Alturas county while it still existed, and to the treasurer of Blaine county since the creation thereof, and payment thereon demanded by the holder thereof, and payment thereof, or any part thereof, was refused, on ground that there was no money in the treasury applicable to payment thereof. And plaintiff avers that the Board of County Commissioners of said Alturas county neglected and refused to levy any tax to meet the interest and principal or interest or principal of said bonds as they became due (or otherwise or at all), as required by said act of the legislature, in pursuance of which they were issued, and neglected and refused to levy any tax to pay the principal of said bonds or said coupons, so owned and held by the plaintiff, or any part thereof, and continued to so neglect and refuse to levy any tax to pay said bonds and coupons, or any part thereof, down to the time said Alturas county was abolished; and plaintiff avers that on the first day of January, 1890, when said coupons No. 7 matured and became due and payable, there was no money in the treasury of Alturas county legally applicable thereto, for the payment of said coupons or any portion of them, and from thence hitherto there has been no money in the treasury of said Alturas county down to the time it was abolished, for

the payment of the coupons held by plaintiff, or any part or portion of them; and that the then treasurer of said county in reply to said demands of payment so wrote and informed the holder of said bonds and coupons that he could not pay the same for want of funds, and that since the creation of said Blaine county there has never been any levy of a tax to pay said bonds and coupons, or any part or portion thereof, held by plaintiff, by the commissioners of Blaine county, and that since Blaine county has been created there have never been any moneys or funds in the treasury of Blaine county applicable to the payment of said bonds and coupons owned by plaintiff, or any part or portion thereof, and that there has never been any levy of a tax to pay said bonds and coupons, or any part or portion of them, either by Alturas county or by Blaine county, or by any officer or officers thereof, since 1889, and that there is not now and never was any money or funds in the treasury of Blaine county legally applicable to the payment thereof, and that there was not, during the existence of Alturas county, any money or funds legally applicable to the payment of said bonds and coupons, or any part or portion thereof, nor during the entire existence of Alturas county was any tax levied to provide for payment of or on the same, or any attempt, by tax or otherwise, to provide for payment of or on the same; that demand for payment being made, the defendant and its treasurer replied in writing substantially that the same could not be paid for want of funds, and that there were no moneys in the treasury applicable to payment of same.

XII.

That the amount in controversy between the plaintiff and the defendant in this action is the sum of ten thousand five hundred and ninety dollars ($10,590), exclusive of interest, and plaintiff is entitled, by the laws of Idaho, to interest at the rate of ten per cent per annum upon the principal of said bonds from the time they came due, and to like interest upon said coupons from the times they came due respectively.

XIII.

That on March 7, 1889, the then territory of Idaho divided said Alturas county, and from the territory thereof formed the counties of Elmore and Logan, and also gave a large portion of said Alturas county to Bingham county, and in said division act enacted that the indebtedness of old Alturas county, except this said bonded courthouse indebtedness, should be ratably apportioned by accountants appointed for that purpose between the counties of Bingham, Elmore, Logan and Alturas, as then constituted, but that the said courthouse bonded indebtedness should be and remain the indebtedness of Alturas county. Thereupon the county of Alturas, and the officers and people thereof, declared that said apportionment was unfair to Alturas county, and illegal, and that the said courthouse indebtedness should also be apportioned and divided between said new counties and Bingham and Alturas county, and from thence refused to levy any tax to pay said bonds and coupons, and refused to appoint accountants under said act to adjust said indebt-

edness, or to do any other act or thing to provide for or recognize said bonded courthouse indebtedness, and continued so to deny said indebtedness down to Aug., 1894, the time said Alturas county was by mandate ordered to adjust said indebtedness.

In the year 1894 proceedings were brought by Elmore, Bingham, and Logan counties against Alturas county, in the Supreme Court of the State of Idaho, to compel Alturas county to proceed to adjust said indebtedness of old Alturas county under said act of division and apportionment, and such proceedings were had in said court in said matter that said Supreme Court commanded Alturas county to proceed to such apportionment under said act, and thereafter Alturas county and said other counties did, under said act, and under the mandate of said Court, proceed to said adjustment and apportionment, and the same resulted in the report of the accountants being filed in the office of the auditor and clerk of Alturas county and in said office of the said other counties, which report placed and left upon Alturas county the obligation to pay all of said courthouse bonded indebtedness, and the same was then and thereafter assumed and recognized by said Alturas county as its sole indebtedness.

XIV.

On account of said indebtedness and other indebtedness of said Alturas county, the officers and inhabitants thereof took the ground that Alturas county was unable to pay the same, and, making such representations, went

before the next Legislature of Idaho that assembled after said such adjustment of indebtedness, and asked to have said Alturas county abolished and its territory consolidated with the territory of said Logan county, and a new county, called Blaine county, formed, comprising all the territory, property, and inhabitants of both Alturas and Logan counties.

XV.

On March 5, 1895, the Legislature of Idaho passed an act, entitled "An Act to abolish the counties of Alturas and Logan, and to create and organize the county of Blaine." And the first section of said act provides that "The counties of Alturas and Logan are hereby abolished and the county of Blaine is hereby created, embracing all of the territory heretofore included within the boundary lines of said Alturas and Logan counties."

Section two of said act provides that "the county seat of Blaine county is hereby established at the town of Hailey."

Section five of said act provides that "All the real and personal property. county records, books, papers, money, credits, furniture, and fixtures belonging to Alturas and Logan counties shall become the property of Blaine county, and when this act shall take effect, and the proper officers of Blaine county shall have been duly appointed and qualified, as in this act provided, all books, papers, records, money, and personal property belonging to said Alturas and Logan counties shall, by the custodians of the same,

be immediately delivered to the proper officers of Blaine county, who shall give proper receipt and vouchers for the same."

Section seven of said act provides that "All valid and legal indebtedness of Alturas and Logan counties shall be assumed and paid by the county of Blaine."

Section eight of said act provides that "All rights of action now existing in favor of, or against, said Alturas or Logan county, may be maintained in favor of or against Blaine county."

Section thirteen of said act provides that "Whereas an emergency exists, this act shall take effect and be in force from and after its passage." Approved March 5, 1895.

And within five days from and after the approval of said act, the officers of Blaine county were duly appointed and qualified, and were acting, and said Blaine county was fully organized as a county of Idaho.

XVI.

That after Blaine county was created and organized, and on the 18th day of March, 1895, the Legislature of Idaho passed an act entitled "An Act to create the county of Lincoln, to locate the county seat of said county, and to apportion the indebtedness of Blaine county; to attach said county to the Fourth Judicial District, and to attach said county to the Ninth Senatorial District," which said last entitled act creates the county of Lincoln out of territory of Blaine county; and section five of said act enacts and provides that "The indebtedness of Blaine county must be apportioned between the coun-

ties of Blaine and Lincoln in the same ratio that the property of said counties bears to each other, and the territory hereby stricken off and erected into the county of Lincoln must be held to pay its ratable portion of the existing liabilities of the county of Blaine, from which it is taken," and in apportioning the said debt of Blaine county, under said act, the said bonded courthouse indebtedness was put in by Blaine county as a part of its legal and valid indebtedness to be shared by Lincoln county, and said bonded courthouse indebtedness was and is apportioned between said counties of Blaine and Lincoln, and by said apportionment Lincoln county is to pay to Blaine county nearly one-half of said bonded courthouse indebtedness. And the county of Lincoln is by said act required to levy a tax for its portion of said indebtedness, and pay over to Blaine county the money so raised, which said money can only be used by Blaine county to pay off said indebtedness (including said courthouse bonded debt) or the securities into which the same has been funded. And said act took effect and was law from and after its passage, and said Blaine county is now holding said Lincoln county, under and by virtue of said act, to pay it a sum equal to nearly one-half of said bonded courthouse indebtedness, which moneys can be used by Blaine county for the purpose of paying off the original Blaine county indebtedness, including said bonded courthouse debt, and for no other purpose.

XVII.

That the original owner and purchaser of said bonds, especially mentioned and described herein, and the cou-

pons attached thereto, and on which this action was based, was never a citizen or resident of the State or Territory of Idaho, and was, at the time of his selling and transferring the same to the assignor and grantor of plaintiff, a resident and a citizen of the State of Washington, and this action might have been maintained in this court to recover the judgment herein demanded if no assignment or transfer had ever been made of said bonds and coupons herein particularly described, and alleged to be owned by this plaintiff.

Wherefore, plaintiff demands judgment against defendant for the sum of nine thousand three hundred sixty dollars ($10,590), with interest on $9,000, the principal sum of said bonds, from the first day of November, 1891, at the rate of ten per cent per annum; and like interest on $540, the amount of said coupons No. 7, from the first day of January, 1890; and like interest on $540, the amount of said coupons No. 8, from the first day of January, 1891; and like interest on $450, the amount of said coupons No. 9 from Nov. 1, 1891, and for like interest on said judgment; and for plaintiff's costs and disbursements in this action.

SELDEN B. KINGSBURY,
Attorney for Plaintiff.

State of Montana, }
County of ———. } ss.

Frank C. Robertson, being duly sworn, says: I am the plaintiff in the above-entitled action; I have read the foregoing complaint and know the contents thereof, and that the same is true of my own knowledge, except as to

the matters therein stated to be on information and belief, and as to those matters I believe it to be true.

FRANK C. ROBERTSON.

Subscribed and sworn to before me this 9 day of September, 1897.

[Seal] J. W. STREVELL,
Notary Public.

State of Idaho, }
County of Ada. } ss.

Selden B. Kingsbury, being duly sworn, says: I am attorney for plaintiff in above-entitled action; I have read the foregoing complaint and know the contents thereof, and that same is true of my own knowledge, except as to matters therein stated on information and belief, and as to those matters I believe it to be true; the reason why I verify this complaint is because plaintiff is not in and does not reside in Ada county, Idaho, where I reside.

S. B. KINGSBURY.

Subscribed and sworn to before me this 2d day of December, 1897.

A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 136. In the Circuit Court of the United States in the District of Idaho and in the Central Division thereof. Frank C. Robertson, Plaintiff, v. Blaine County, Defendant. Complaint. Filed Sept. 30th, 1897. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho.

FRANK C. ROBERTSON,
Plaintiff,
vs.
BLAINE COUNTY,
Defendant.

Stipulation to Amend Complaint.

It is hereby stipulated by and between the attorneys herein, in the above-entitled action, for the respective parties herein that the plaintiff may amend his complaint by interlineation.

SELDEN B. KINGSBURY,
Attorney for Plaintiff.
LYTTLETON PRICE,
Attorney for Defendant.

[Endorsed]: No. 136. Circuit Court U. S., Idaho Dist. Frank C. Robertson, Plaintiff, v. Blaine County, Defendant. Stipulation to amend complaint. Filed Dec. 2d, 1897. A. L. Richardson, Clerk.

In United States Circuit Court, District of Idaho.

FRANK C. ROBERTSON,
Plaintiff,

vs.

BLAINE COUNTY,
Defendant.

Acknowledgment of Service.

I hereby accept and acknowledge service of the original complaint as amended by interlineation.

LYTTLETON PRICE,
Defendant's Attorney.

[Endorsed]: No. 136. U. S. Circuit Court, District of Idaho. Frank C. Robertson, Plaintiff, v. Blaine County, Defendant. Acknowledgment of service. Filed Dec. 4th, 1897. A. L. Richardson, Clerk. Selden B. Kingsbury Atty. for Plaintiff.

In the Circuit Court of the United States for the District of Idaho.

FRANK C. ROBERTSON,
Plaintiff,
vs.
BLAINE COUNTY,
Defendant.

Demurrer.

Comes now the above-named defendant and demurs to the plaintiff's complaint herein, and as ground of demurrer specifies:

That the said complaint does not state facts sufficient to constitute a cause of action.

That the alleged cause of action in said complaint set forth is barred by the provisions of section 4052 of the Revised Statutes of the State of Idaho.

Wherefore, defendant prays judgment whether it shall further answer the said complaint, and for such further orders as may be proper in the premises.

LYTTLETON PRICE,
Defendant's Attorney.

[Endorsed]: No. 136. In the U. S. Circuit Court of the United States, District of Idaho. Frank C. Robertson, v. Blaine County. Demurrer. Filed Dec. 10, 1897. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho.

FRANK C. ROBERTSON,
Plaintiff,
vs.
BLAINE COUNTY,
Defendant.

Decision on Demurrer.

SELDEN B. KINGSBURY, for Plaintiff.
LYTTLETON PRICE, for Defendant.

To the complaint herein the defendant demurred, pleading the statute of limitations.

From the complaint it appears that by an act of the territorial Legislature, approved February 8, 1883, the issue by Alturas county of the bonds herein sued upon was authorized for the purpose of building in said county a courthouse and jail, the principal of such bonds "to become due and payable November 1, 1891"; that "the Board of County Commissioners of said county shall, at the time of levy of county taxes, include therein a levy of sufficient tax to meet the interest and principal of said bonds as the same shall become due, and the tax so levied shall be known as the Courthouse Bond Tax, and shall be collected as other taxes are collected, and shall constitute a separate fund, and shall be used for no other purpose. And for the payment of said bonds, principal and interest, all the taxable property of said county

is hereby pledged"; that by an act of 1889 Alturas county was divided into Alturas, Logan, and Elmore counties and by an act approved March 5, 1895, Blaine County was organized out of the territory composing Alturas and Logan counties, and it was provided by section 7 that "All valid and legal indebtedness of Alturas and Logan counties shall be assumed and paid by the county of Blaine," and by section 8 that "All rights of action now existing in favor of or against said Alturas or Logan county may be maintained in favor of or against Blaine county"; that on the 18th day of March, 1895, the Legislature passed another act, cutting off from Blaine county the county of Lincoln. By this last act it appears that Blaine county was left composed chiefly of the territory which had, just prior to the passage of the two last named acts, constituted Alturas county. By section 4052, Idaho Revised Statutes, it is provided that "an action upon any contract, obligation, or liability not founded upon an instrument in writing" must be commenced within five years from the time it becomes due, and that this action was commenced September 30, 1897.

1. The plaintiff claims that the statute of limitations does not apply; first, because by the act creating Blaine county the debt was, at that date, renewed and legislated upon Blaine; and second, because neither Alturas nor Blaine county has ever levied any tax or in any manner raised any funds applicable to the payment of the debt.

While counsel in support of his proposition that this debt is to be treated as contracted on March 5, 1895, cites among other authorities, Angell on Limitations, and Ballard v. Bell, 4 Fed. Cases, from which the argument

would seem to follow that such a debt as this is a "specialty" and a creature of statute, and that to such the statute of limitations does not apply, it must be observed that those authorities refer to the statute of limitations of King James, which applied to "actions of debt grounded on any lending or contract without specialty." Certainly under that statute, specialties, which were only a higher grade of contracts because sealed, were excepted from its operation, so also debts created by statute were not included thereunder. But the Idaho statute sweeps away all those intricate distinctions, as well as the much learning displayed in their discussion, and whether the debt here sued upon is a specialty or a creature of statute it is within the intent of the Idaho law, for it includes all kinds of contracts whether under seal or not, and all debts created by statute.

Under this branch of the case certainly the most important question is, when the debt sued upon became due; if not until March 5, 1895, as claimed by plaintiff, then unquestionably it is not barred. But, first, what is the debt sued upon? Plaintiff's counsel says it is in the nature of a specialty; that it was created by statute on the 5th day of March, 1895, and that such act operated to create of the bonds a new debt against Blaine county from that date. The complaint is not framed as upon a new debt, but it alleges all the facts leading up to the issue of the bonds; then copies one to answer for all, which, upon its face, shows it became due November 1, 1891, and demands judgment for "the principal sum of said bonds" for the coupons attached to them and interest. Surely this complaint, upon its face, indicates an action upon

the original bonds, and not upon a debt growing out of them created at a subsequent date.

It cannot be doubted that the Legislature might, at least before the bar of the statute had attached, have extended the time for their payment, or have fixed another date than that first fixed when they should become due. The Legislature has not, at least in explicit terms, done so. Has it done so by implication? All that it seems to have done is by sections 7 and 8, above quoted, which simply direct that all existing indebtedness of Alturas and Logan counties should continue as valid, and be assumed and paid by Blaine, and that the same actions that might have maintained by or against Alturas could be by or against Blaine. It did not in terms create a new debt, but recognized the validity of the old, and that Blaine should pay it, and as there was no pretense of changing the time or manner of payment, it seems clearly to follow that it must be paid by Blaine just as Alturas was to pay it. Blaine county simply took the place occupied by Alturas; it assumed all its burdens, was invested with all its rights. Had Alturas continued to exist and continued responsible for this debt, would it not have been one of its rights to plead the bar of the statute against this claim after five years from November 1, 1891? To me it seems so unquestionably, if a county may ever plead the statute. If this was a right due Alturas why should it not inure to Blaine, upon which is entailed all the burdens? Moreover, while in name Blaine county is a new party, in these transactions, in reality it is substantially the same people and territory which composed Alturas county. It is in substance the

same party by another name continuing responsible for the same debt. The complaint, as well as counsel's brief, refers to the new promise of both Alturas and Blaine counties to pay the debt, but under the Idaho statute, section 4078, no such promise or acknowledgment is sufficient to bar the operation of the statute, "unless the same is contained in some writing signed by the party to be charged therewith." It appears to me that only through a strained construction can it now be held that this action is upon a new promise, or that as to defendant it is to be deemed one created or accruing from March 5. 1895.

2. Under the claim that defendant cannot avail itself of the statute, because neither county had levied a tax or raised funds to pay this debt, it is argued that the duty of paying it is such an express trust upon the county as bars the operation of the statute, and in general support of this proposition, among other citations, are Underhill v. City of Sonora, 17 Cal. 173; Freehill v. Porter, Treasurer, 4 Pac. 646; and County of Lincoln v. Luning, 133 U. S. 529.

If the views advanced by counsel are correct, and they are sustained by these authorities, provided the facts upon which the latter rest are such as to make them applicable to this case, it certainly would seem that a municipal debtor can seldom, if ever, plead limitations. If such a debtor is always a trustee of an express trust; if it must always show it has levied the necessary taxes or actually collected the money to pay the debt before it can so plead, and it seems the argument is nothing less than this, there is little, if any, opportunity for it ever

to plead the statute. Certainly it is the duty of a municipal debtor to pay its debts, and in a sense a trust devolves upon it to do so, but it is likewise as much the duty of an individual debtor to pay his debts, and a like trust devolves upon him to pay. That the municipal debtor acts through its agents and representatives can make its duty to pay and its trusteeship no different from that of the individual debtor. Even if Courts should attempt to make a distinction between the class of debtors in this regard, the Idaho statute under consideration does not, but so far as its phraseology goes it is applied to all alike. It cannot be that these decisions referred to by counsel attempt to strike out all application of the statute to municipal debtors, or that they should be considered as counsel would have them—in fact, in each there is an implication that the statute may be applied to such debtors when the facts justify. Let us examine them briefly. In the Sonora case it appears that before the bonds were due the Legislature extended the time of, and provided a special fund for, their payment, and this legislative act was subsequently repeated. The Court says the recognition of the debt and the making of provision for its payment by the Legislature "is enough to withdraw the case from the operation of the statute," but in addition to this, conceding the power of the Legislature to so extend the time of payment, it was in this case so extended from time to time that the debt never became barred. These facts are far different from those in this case. Here the Legislature recognized the debt, but did not extend the time of payment, nor did it provide any special tax, fund, or means of pay-

ment, but the whole question of the time and means was left as in the original bill. In the case of Freehill v. Porter the facts are too briefly stated for its full understanding; it does appear, however, that fifty-five per cent of certain revenue provided for was set apart for the payment of the bonds and their interest, and that this fund so expressly devoted to this special purpose had been diverted by some of the officers of the corporation. The opinion says that "according to the act of 1863 (not recited) no action could be maintained against the city on these bonds or coupons," and also it says, as claimed by counsel in this case, that "it was the duty of the city to make provision for the payment of the bonds and coupons according to the statute under which they were issued, and by omitting to perform such duty the city could not create the defense of the statute of limitations; not until the funds were in the treasury, properly available, would the statute begin to run; not until that period would the petitioner have any right of action or proceeding against the treasurer. "Why not? Presumably from some provision of the statute specially applicable to the matter. It will be noted also that this was an action of mandamus against the treasurer, probably to pay out the funds collected under the law for this very purpose. While the facts are not fully reported, there is sufficient in the case to show it is not like the one under consideration, and that it is not a guide for it.

In the 133 U. S. it is said that "By the general limitation law of the State some of the coupons were barred, but there has been this special legislation in reference to these coupons. The bonds were issued under the

funding act of 1873; in 1877 the county was delinquent in its interest and the Legislature passed an act amendatory to the act of 1873. This amendatory act provided for the registration of overdue coupons, and imposed upon the treasurer the duty of thereafter paying the coupon, as money came into his possession applicable thereto in the order of their registration. (Stat. of Nev. 1877, 46.) The coupons, which by the general limitation law would have been barred, were presented as they fell due to the treasurer for payment, and payment demanded and refused, because the interest fund was exhausted. Thereupon the treasurer registered them as presented, in accordance with the act of 1877, and from the time of their registration to the commencement of this suit there was no money in the treasury applicable to their payment. This act providing for registration and for payment in a particular order was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons as were registered in the order of their registration, as fast as money came into the interest fund, and such promise was by the creditor accepted, and when payment is provided for out of a particular fund, to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that the fund has been provided." The opening sentence of the above quotation says that certain

coupons were already barred, but for those in question there had been such special legislation as protected them against the statutes. This special legislation was in part that the treasurer should thereafter pay the "coupons as money came into his possession applicable thereto in the order of their registration"; that is, the coupons were not payable, not due, until the money was actually in the treasury to pay them. Certainly under such a provision the statute of limitations could not begin to run until such event occurred, and this is all that is decided. It further appears that from the registration of these coupons to the commencement of the suit there was no money in the treasury, hence the coupons could not have been barred. Thus in all these cases where the statute was held not to obtain it distinctly appears there had been such legislation as extended the time of payment, or as set apart a special fund for payment, and so dedicated to this special purpose as well might constitute an express trust.

As appears, the law applicable to this case is quite different. There certainly is nothing in it which prevented the holder of the bonds after November 1, 1891, from maintaining his action thereon; there never was any fund dedicated specially to the payment of these bonds, nor any special provision for their payment except the general one in the original act before referred to. If that is sufficient to constitute such a special fund or such an express trust as to avoid the operation of the statute, then, as before said, it is virtually a dead letter as to all municipal debtors, for every law authorizing the issue of bonds makes such general provision for their

payment, and yet it has been often held that actions upon them become barred by neglect.

If this were simply a question of ethics, the demurrer would be overruled, but being one of law alone it is sustained.

While for personal reasons I would have avoided considering this case, yet there being no legal objections nor any suggestions to the contrary made, I have heard it, but hope it will be taken to another Court for review.

Boise, Idaho, January 31st, 1898.

BEATTY,

Judge.

At the request of plaintiff's counsel ten days is allowed him in which to amend the complaint.

BEATTY,

Judge.

To the above ruling sustaining the demurrer, the said plaintiff, by his counsel, then and there duly excepted and the same is allowed.

BEATTY,

Judge.

After the foregoing decision the plaintiff amended his complaint, to which defendant interposed its demurrer. It is not found that the amendments to the complaint are such as to justify a change in the above ruling, therefore the present demurrer is sustained.

Boise, Idaho, March 1, 1898.

BEATTY,

Judge.

[Endorsed]: No. 136. Robertson v. Blaine County. Decision on Demurrer. Filed Feb. 1, 1898. A. L. Richardson, Clerk.

In the Circuit Court of the United States, District of Idaho.

FRANK C. ROBERTSON,
Plaintiff,
vs.
BLAINE COUNTY,
Defendant.

Notice of Motion to Strike Out Amended Complaint.

To Selden B. Kingsbury, Esq., Plaintiff's Attorney.

Dear Sir: Please take notice that I shall present the motion to strike out the plaintiff's amended complaint filed herein, a copy of which is attached hereto and served upon you, to the said Circuit Court, at the courtroom thereof, at Boise, Idaho, on the first day of the next ensuing term of said Court, or as soon thereafter as counsel can be heard; or at such time before the next term of said court as the Judge thereof will hear the same upon agreement between us for its submission.

Very respectfully yours,

LYTTLETON PRICE,
Defendant's Attorney.

In the Circuit Court of the United States, District of Idaho.

FRANK C. ROBERTSON,

Plaintiff,

vs.

BLAINE COUNTY,

Defendant.

Motion to Strike Out Amended Complaint, and Withdrawal of Motion.

The defendant above named moves to strike out the plaintiff's amended complaint filed herein on the following grounds, to-wit:

That the matters and things therein set forth and alleged as a cause of action which were not contained and alleged in the original complaint herein, constitute another and different cause of action from that alleged in the said original complaint. That is to say: In and by the said original complaint the plaintiff alleges the bonds and coupons of Alturas county and the act of the Legislature of Idaho imposing the payment thereof upon the defendant and granting and allowing to the holder of the said bonds any and all actions he had against Alturas county, against the county of Blaine, and to be maintained against it the same as it might have been against the county of Alturas, as the cause of action therein stated. And in and by the said amended complaint the plaintiff sets forth and alleges certain allegations of fact calculated and intended to show and state a claim and demand against the defendant for debt, independent of the con-

tract and obligation of the said bonds of Alturas county, and a specific assumption of and promise by the defendant to pay the same, and constitute a departure from the cause of action set forth in the original complaint, and offer a new, separate, and distinct cause of action from that offered and tendered in the said original complaint. That the said amended complaint therefore does not cure the original complaint in the particulars upon which the defendants demurrer thereto was sustained, nor change the cause of action as therein alleged in any substantial particular, but adds to and supplements if with allegations of fact not germane to the cause of action therein alleged. And that such added and supplemental allegations, to the extent that they constitute any cause of action, are incongruous and inconsistent, and not in harmony with the cause of action alleged in said original complaint.

LYTTLETON PRICE,
Defendant's Attorney.

The defendant herein hereby withdraws the within motion to strike out the amended complaint.

LYTTLE. PRICE,
Defendant's Attorney.

[Endorsed]: No. 136. U. S. Circuit Court, District of Idaho. Frank C. Robertson, v. Blaine County. Notice and motion to strike out, etc. Filed Feb. 26, 1898. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in the District of Idaho, and in the Central Division thereof.

FRANK C. ROBERTSON, Plaintiff, vs. BLAINE COUNTY, Defendant.	Plaintiffs' Amended Complaint filed by permission of Court first had and obtained.

Amended Complaint.

This plaintiff, a resident of Miles City, State of Montana, and a citizen of said State, complains of said defendant, Blaine county, a county of the State of Idaho, and a public political corporation organized and existing under the laws of the State of Idaho, situate in the Central Division of the District of Idaho, and complaining, avers:

I.

That this plaintiff is, and at the time of the commencement of this action, and at the several times herein mentioned, was, a citizen of the State of Montana, domiciled therein.

II.

That the defendant is, and at and during all the times herein mentioned since March 5th, 1895, was, a county of the State of Idaho, situate in the Central Division of the District of Idaho, and was and is a body politic and corporate, organized and existing by and under the laws of Idaho, and as such has power to sue and be sued.

III.

That prior to, and from and after 1864, and continuously to March 5, 1895, there was in Idaho a certain county of Idaho, known, named, and being Alturas county, and that during all the times of its existence it was a body politic and corporate, a public political corporation, and county of Idaho; that in 1883, and down to 1889, said Alturas county embraced within its borders all the lands and property in the territory of Idaho which now form all of said Blaine county, all of Lincoln county, all of Elmore county, and portions of Bingham, Bannock, and Fremont counties.

IV.

That the Legislature of the then territory of Idaho, by an act entitled "An Act providing for the erection of a courthouse and jail at Hailey, the county seat of Alturas county," approved February 8, 1883, authorized and required the said county of Alturas to erect a county courthouse and jail at the town of Hailey, the county seat of said county, and for that purpose authorized and required said Alturas county to issue forty thousand dollars in negotiable bonds, in denominations of five hundred dollars and one thousand dollars, bearing interest at the rate of six per cent per annum, payable January 1st of each year, and required that the principal of said bonds become due and payable November 1, 1891, and that said bonds should be registered and numbered, as will more fully appear by reference to said act, hereby expressly referred to; and said act provided that "The

board of county commissioners of said county shall, at the time of levy of county taxes, include therein a levy of sufficient tax to meet the interest and principal of said bonds as the same shall become due, and the tax so levied shall be known as the Courthouse Bond Tax, and shall be collected as other taxes are collected, and shall constitute a separate fund, and shall be used for no other purpose. And for the payment of said bonds, principal, and interest, all the taxable property of said county is hereby pledged"; and "that all unexpended balances remaining in the hands or custody of said treasurer shall, on completion of said building, be carried into the general fund of said county."

V.

That under and in pursuance of said act the principal and proper officer of said Alturas county caused said courthouse and jail to be erected at said town of Hailey, as by said act required, and the same was so erected and accepted and used thereafter by Alturas county, and is now owned by defendant, and is used by the defendant as its courthouse and jail.

VI.

That under the provisions of said act the Board of County Commissioners of said Alturas county secured the engraving and printing of said bonds therein provided for, and ordered to be issued; and did concerning the same as and all required by said act, and placed the same in the hands of the county treasurer of said Alturas coun-

ty, who registered and numbered the same, and did on, with, and concerning the same as by said act then required, and who thereupon negotiated and sold the same, as required by said act, and not otherwise; and no expense whatever that was incurred in carrying out the provisions of said act and building said courthouse and jail was charged to or paid out of any funds other than arose from the sale of said bonds; and no moneys arising from sale of said bonds were used otherwise than as by said act required.

VII.

That said bonds are dated May first, 1883, and became due and payable November first, 1891, and that at the time they were negotiated they were numbered in two series; that is to say, the thousand dollar bonds were consecutively numbered in one series, and the five hundred dollar bonds were consecutively numbered in a distinct series, and they and their interest coupons were payable to bearer at the office of the county treasurer of said county, at Hailey, the county seat of said county; bore interest at the rate of six per cent per annum, payable January first of each year, except the interest from January first to November first, 1891, which was payable at the maturity of said bonds; and a part of said bonds are in the denomination of one thousand dollars each and the residue are in the denomination of five hundred dollars each; and each of said bonds expressed on its face the amount for which it was issued, when due, and the rate of interest, and was signed by the chairman of the Board

of County Commissioners of said county, was attested by the clerk of said board with his seal, and was countersigned by the treasurer of said county, and by him numbered and registered; and each of said bonds, when negotiated, had interest coupons attached, payable to bearer, whereby said Alturas county promised to pay to bearer the interest that should accrue on said bonds, as the same became due, as aforesaid; and each of said bonds, except as to the numbers thereof, which are consecutive, and the principal sum, which is either one thousand dollars or five hundred dollars, is in words and figures as follows, to-wit:

(No. 19)

United States of America. Alturas county. Territory of Idaho.

COURTHOUSE BOND.

($500.)

Know All Men by These Presents, that the county of Alturas, in the territory of Idaho, acknowledges itself to be indebted, and for value received promises to pay to H. G. Knapp, or bearer, the sum of (five hundred dollars), lawful money of the United States of America, at the office of the county treasurer of Alturas county, at Hailey, the county seat thereof, on the first day of November, in the year of our Lord one thousand eight hundred and ninety-one, with interest thereon at the rate of six per cent per annum, payable annually on the first day of January of each year at said county treasurer's office,

upon the presentation and surrender of the annexed coupons for said interest as they severally become due. This bond is executed and issued for the purpose of erecting a courthouse and jail at Hailey in said county, and under the provisions and in pursuance of an act of the legislative assembly of the territory of Idaho, entitled "An Act providing for the erection of a courthouse and jail at Hailey, the county seat of Alturas county," and approved February 8th, A. D. 1883.

In testimony whereof, and in accordance with said act, the county of Alturas hereby pledges its full faith, credit, and property for the punctual payment of this bond and the interest thereon, as aforesaid, and has authorized the same to be signed by the chairman of the Board of County Commissioners of said county, attested by the auditor and recorder, ex-officio clerk of said board, with his official seal, and countersigned by the treasurer of said county, as witness their hands and said official seal affixed hereto at said county.

Executed at Hailey, the county seat of said Alturas county, this first day of May, A. D. 1883.

[Seal] J. K. MORRILL,

Chairman of the Board County Commissioners of Alturas County, Idaho Territory.

Attest:

[Seal] C. B. FOX,

Clerk Board of Commissioners.

Countersigned,

J. M. BURKETT,

County Treasurer.

(On back as follows:)

(No. 19.) Alturas County Courthouse Bond. ($500.) Dated 1st May, 1883. Payable Nov. 1st, 1891. Interest 6 per cent per annum. Payable annually on the first day of January.

And the interest coupons attached to each of said bonds when they were negotiated, as aforesaid, were consecutively numbered from one to nine, bore the number of the bond to which they were attached; and except as to the numbers of the coupons, the number of the bond to which they were attached, and the date of payment, and the amount of the coupon, which was the amount of the interest due upon the bond at the maturity of the coupon, said interest coupons were in words and figures following, to-wit:

(No. 8.) ($30.00.)

The county of Alturas, in the territory of Idaho, will pay to bearer (thirty dollars), at the office of the county treasurer of said county on the (first day of January, A. D. 1891), being interest due at said date on bond (No. 19, nineteen).

J. K. MORRILL,

Chairman Board of County Commissioners, Alturas County, Idaho.

C. B. FOX,

Clerk of Board of County Commissioners.

Countersigned,

J. M. BURKETT,

County Treasurer.

That at the time said coupon bonds were so issued under and by the provisions of said act, J. K. Morrill was, of the Board of County Commissioners, the Chairman and acting chairman of said Alturas county; that C. B. Fox was, at the time said bonds were issued, the auditor, recorder, and clerk of Board of County Commissioners of said county, and acting as such; that at the time said issue of bonds was made, J. M. Burkett was the treasurer and acting treasurer of said county, and that each of said persons signed and each executed and united in the execution and issue of said bonds, as the respective office of each required in the making, signing, executing, and issue of said bonds under the orders and directions of the then Board of County Commissioners of said Alturas county, and so doing and acting were respectively each performing the duties of their respective offices, and were each and all fully authorized, empowered, and required so to make, sign, issue, and on behalf of said county execute and issue said bonds as above set forth; and that said bonds were of the legal and valid indebtedness of said Alturas county from and after the issue of the same, during all the subsequent existence of said Alturas county, and until creation of Blaine county, and were so recognized by said Alturas county and the officers thereof, and subsequently by Blaine county and its officers, in all matters of suit, settlement, and of county affairs, down to time of bringing of this action; and that while said bonds and coupons were owned and held by the predecessors in ownership of plaintiff, the said interest coupons were paid as same became due, down to time coupon No. 7 be-

came due, and that Blaine county recognized said indebtedness as a legal and valid obligation and debt legislated upon it, and promised to pay the same until the time of the institution of these proceedings, when it claimed that the indebtedness was barred by the statute of limitations; and no other defense has ever been set up or claimed on or against said indebtedness.

VIII.

That before maturity of said bonds, and before any of the coupons attached, as aforesaid, became due, six of said bonds of the denomination of one thousand dollars each, and numbered in the series of one thousand dollar bonds, as Nos. 5, 6, 7, 8, 9, and 10; and six of said bonds, of the denomination of five hundred dollars, and numbered in the series of five hundred dollar bonds, as Nos. 2, 37, 19, 38, 39, and 40, amounting in all to the principal sum of nine thousand dollars ($9,000), part of said bonded indebtedness of forty thousand dollars, with interest coupons for all the interest to accrue thereon up to the time of maturity of said bonds, thereto attached, were purchased and owned by a bona fide purchaser, for value, who was then a citizen and resident of the State of New York, and who thereafter removed to and became, and, as affiant is informed and believes, continues to be, a resident and citizen of the State of Washington, and who never was and is not now a resident or citizen of the State of Idaho, and who sold and delivered the same to the assignor and grantor of the same, for value, to this plaintiff, who became, was, and is the owner and holder of said bonds and said attached coupons, and at time of

bringing this action was and is now the bona fide owner and holder of the bonds and coupons, and of that portion of said Bonded Courthouse Indebtedness represented and evidenced by the same, and in this allegation described.

IX.

That no part of the principal of said twelve bonds hereinbefore particularly described, or of this claim or any claim based thereon or evidenced thereby, amounting to the sum of nine thousand dollars, as aforesaid, part of said bonded indebtedness of forty thousand dollars, has been paid, and the said sum of nine thousand dollars, besides interest, became due thereon on the first day of November, 1891, and is now due, and was, at the commencement of this action, due, owing, and payable, and unpaid, upon the said bonds above described and numbered, and upon this claim so evidenced and based, from said defendant to this plaintiff:

X.

That of said coupons attached to said bonds when issued and negotiated as aforesaid coupons No. 7 due January 1, 1890, each for sixty dollars, interest for the year 1889; coupons No. 8, due January 1, 1891, each for sixty dollars, interest for the year 1890; and coupons No. 9, due at maturity of said bonds, November 1, 1891, each for fifty dollars, interest from January 1, 1891, to November 1, 1891, attached to and for interest on said one thousand dollar bonds No. 5, 6, 7, 8, 9, and 10, respectively, of the

series of one thousand dollar bonds; and coupons No. 7, due January 1, 1890, each for thirty dollars, interest for the year 1889; coupons No. 8, due January 1, 1891, each for thirty dollars, interest for the year 1890; coupons No. 9, due at maturity of said bonds, November 1, 1891, each for twenty-five dollars, interest from January 1, 1891, to November 1, 1891, attached to and for interest on said five hundred dollar bonds Nos. 2, 37, 38, 19, 39, 40 of the series of five hundred dollar bonds at time it was issued and negotiated, amounting in the aggregate to the sum of $1,590, besides interest from maturity, have not been paid, nor has the claim evidenced thereby, nor any part or portion of them or of said claim; and all of the same is now, and was at the commencement of this action, due and owing upon said bonds and said coupons and claim from said defendant to this plaintiff, together with legal interest thereon from the several times when the said coupons were due, as aforesaid.

XI.

That said bonds and coupons were, as they respectively matured and became due and payable as aforesaid, presented for payment to the treasurer of said Alturas county, at his office, while it still existed, and to the treasurer of Blaine county, at his office, since the creation thereof, and payment thereon demanded by the holder thereof, and payment thereof, or any part thereof, was refused, on the ground that, and for the reason given, that there was no money in the treasury applicable to the payment of them, which reason, so given, was in accordance with

the fact; and plaintiff avers that the Board of County Commissioners of said Alturas county neglected and refused to levy any tax to meet the interest and principal or interest or principal of said bonds as they became due (or otherwise or at all), as required by said act of the Legislature, or in any manner or at all, in pursuance of which they were issued, and neglected and refused to levy any tax to pay the principal of said bonds or said coupons, so owned and held by the plaintiff, or any part thereof, and continued so to neglect and refuse to levy any tax to pay said bonds and coupons, or any part thereof, down to the time said Alturas county was abolished; and plaintiff avers that on the first day of January, 1890, when said coupons number seven matured and became due and payable, there was no money in the treasury of Alturas county, legally applicable thereto; that no Courthouse Bond Tax had been levied to pay same or any portion thereof, and that no money was in said special Courthouse Bond Fund, or had ever been, for the payment of said coupons or any portion of them; and from thence hitherto there has been no money in the treasury of said Alturas county, down to the time it was abolished, for the payment of said bonds or any part or portion of them, or for the payment of the coupons held by plaintiff, or any part or portion of them; and that no Courthouse Bond Tax has been levied or collected, and no such fund in anywise created; and that the then treasurer of said county, in reply to said demands of payment, so wrote and informed the holder of said bonds and coupons, and on demand of payment stated "that he could not pay the same for want of funds"; and that since the creation of

said Blaine county there has never been any levy of a tax to pay said bonds and coupons, or any part or portion thereof, held by plaintiff, by the commissioners of Blaine county; and that said commissioners have never levied a Courthouse Bond Tax or any tax to pay same, or any part of same, or at all, and that since Blaine county has been created there have never been any moneys or funds in the treasury of Blaine county, applicable to the payment of said bonds and coupons, and said claim based upon and evidenced thereby, as in said act creating Blaine county provided for, or at all, owned by plaintiff, or any part or portion thereof, and that there has never been any levy of a tax to pay said bonds and coupons, or any part or portion of them, either by Alturas county or Blaine county, or by any officer or officers thereof, since 1889, and that there is not now and never was any money or funds in the treasury of Blaine county legally applicable to the payment thereof, and that there was not, during the existence of Alturas county, any money or funds legally applicable to the payment of said bonds and coupons, or any part or portion thereof, nor during the entire existence of Alturas county was any tax levied to provide for payment of or on the same, or any attempt, by tax or otherwise, to provide for payment of or on the same; that demand for payment being made, the defendant and its treasurer replied in writing, substantially, that the same could not be paid for want of funds, and that there were no moneys in the treasury applicable to the payment of the same; and that, in truth and in fact, no Courthouse Bond Tax has ever been levied to pay same or any part or portion of same, and that said bonds and

said coupons and said claim, so based upon said bonds and coupons and act creating Blaine county, remain wholly unpaid, and that no provisions have ever been made, begun, or attempted by the officers of either Alturas county or of Blaine county to pay same or any portion thereof, other than that said indebtedness was assumed by Blaine county after its organization.

XII.

That the amount in controversy between the plaintiff and the defendant in this action is the sum of ten thousand five hundred and ninety dollars ($10,590), exclusive of interest, and plaintiff is, by the laws of Idaho, entitled to interest at the rate of ten per cent per annum upon the amount of the principal of said bonds from the time they came due, and to like interest upon the amount of said coupons from the times they came due, respectively; and that all claims on contract for money due, by the laws of Idaho, at time said indebtedness was so created drew interest at ten per cent per annum after maturity where the contract was silent as to interest after maturity.

XIII.

That on March 7, 1889, the Legislature of the then territory of Idaho divided said Alturas county, and from the territory thereof formed the counties of Elmore and Logan, and also gave large portions of said Alturas county to Bingham county, and to what are now respectively Fremont and Bannock counties, and in said division act

enacted that the indebtedness of old Alturas county, except this said Bonded Courthouse Indebtedness, should be ratably apportioned by accountants appointed for that purpose, between the counties of Bingham, Elmore, Logan, and Alturas, as then constituted, but that the said Courthouse Bonded Indebtedness should be and remain the indebtedness of Alturas county. Thereupon the county of Alturas and the officers and people thereof declared that said apportionment was unfair to Alturas county, and illegal, and that the said Courthouse Indebtedness should also be apportioned and divided between said new counties and Bingham and Alturas county, and declared that the same was, by virtue of the provisions of the act under which the bonds were issued, a lien upon all the property of Alturas county before division, and from thence refused to levy any tax to pay said bonds and coupons, and refused to appoint accountants under said act to adjust said indebtedness, or to do any other act or thing to provide for or recognize said Bonded Courthouse Indebtedness, and continued so to deny said indebtedness as its sole debt down to August, 1894, the time said Alturas county was by mandate ordered to adjust said indebtedness.

In the year 1894 proceedings were brought by Elmore, Bingham, and Logan counties, against Alturas county, in the Supreme Court of the State of Idaho, to compel Alturas county to proceed to adjust said indebtedness of old Alturas county under said act of division and apportionment, so allotting all of said Courthouse Bonded Debt to Alturas county alone; and such proceedings were had in said court in said matter that said Supreme Court com-

manded Alturas county to proceed to such apportionment under said act and provision, and thereafter Alturas county and said other counties did, under said act, and under the mandate of said Court, proceed to said adjustment and apportionment, and the same resulted in the report of the accountants being filed in the office of the auditor and clerk of Alturas county, and in said office of the said other counties, as by said act required, which report placed and left upon Alturas county the obligation to pay all of said Courthouse Bonded Indebtedness, and the same was then and thereafter assumed and recognized by said Alturas county as its sole indebtedness; but it made no provision for payment of same, claiming to be insolvent and unable to pay the same; and said claim was then warranted by the facts.

XIV.

On account of said indebtedness and other indebtedness of said Alturas county, the officers and inhabitants thereof took the ground that Alturas county was unable to pay the same, and, making such representations, went before the next Legislature of Idaho that assembled after said such adjustment of indebtedness, and asked to have said Alturas county abolished on account of its insolvent condition and the fact that it was unable to pay said and its other indebtedness, and its territory consolidated with the territory of said Logan county, and a new county, called Blaine county, formed, comprising all the territory, property, and inhabitants of both Alturas and Logan counties.

XV.

On March 5, 1895, the Legislature of Idaho passed an act entitled "An Act to abolish the counties of Alturas and Logan and to create and organize the county of Blaine." And the first section of said act provides that "The counties of Alturas and Logan are hereby abolished and the county of Blaine is hereby created, embracing all of the territory heretofore included within the boundary lines of said Alturas and Logan counties."

Section two of said act provides that "The county seat of Blaine county is hereby established at the town of Hailey."

Section five of said act provides that "All the real and personal property, county records, books, papers, money, credits, furniture, and fixtures belonging to Alturas and Logan counties shall become the property of Blaine county, and when this act shall take effect, and the proper officers of Blaine county shall have been duly appointed and qualified as in this act provided, all books, papers, records, money, and personal property belonging to said Alturas and Logan counties shall, by the custodians of the same, be immediately delivered to the proper officers of Blaine county, who shall give proper receipts and vouchers for the same."

Section seven of said act provides that "All valid and legal indebtedness of Alturas and Logan counties shall be assumed and paid by the county of Blaine."

Section eight of said act provides that "All rights of action now existing in favor of or against said Alturas

or Logan county may be maintained in favor of or against Blaine county."

Section eleven of said act provides that "All laws of a general nature applicable to the several counties of this State, and the officers thereof, are hereby made applicable to the county of Blaine."

Section thirteen of said act provides that "Whereas an emergency exists, this act shall take effect and be in force from and after its passage." "Approved March 5, 1895." Particular reference is made to said act, Session Laws of Idaho, 1895, passed at Third Session.

And within five days from and after the approval of said act, the officers of Blaine county were duly appointed and qualified, and were acting, and said Blaine county was fully organized as a county of Idaho.

XVI.

That after Blaine county was created and organized, and on the 18th day of March, 1895, the Legislature of Idaho passed an act entitled "An Act to create the county of Lincoln, to locate the county seat of said county, and to apportion the indebtedness of Blaine county; to attach said county to the Fourth Judicial District, and to attach said county to the Ninth Senatorial District," which said last entitled act creates the county of Lincoln out of territory of said Blaine county; but in section five of said act enacts and provides that "The indebtedness of Blaine county must be apportioned between the counties of Blaine and Lincoln in the same ratio that the property of said counties bears to each other, and

the territory hereby stricken off and erected into the county of Lincoln must be held to pay its ratable portion of the existing liabilities of the county of Blaine, from which it is taken"; and thereafter, in apportioning the said debt of Blaine county under said act, the said Bonded Courthouse Indebtedness was put in by Blaine county as a part of its legal and valid indebtedness "assumed" and to be paid by it, to be shared by and aided by Lincoln county; and said Bonded Courthouse Indebtedness was and is apportioned between said counties of Blaine and Lincoln, and by said apportionment Lincoln county is to pay to Blaine county nearly one-half of said Bonded Courthouse Indebtedness. And the county of Lincoln is, by said act, required to levy a tax for its portion of said indebtedness, and pay over to Blaine county the money so raised which said money can only be used by Blaine county to pay off said indebtedness (including said Bonded Courthouse Debt) or the securities into which the same has been funded, or claim based upon same. And said act took effect and was law from and after its passage, and said Blaine county is now holding said Lincoln county, under and by virtue of said act, to pay it a sum equal nearly to one-half of said Bonded Courthouse Indebtedness. on account of same having been assumed by it, which moneys can be used by Blaine county for the purpose of paying off the original Blaine county indebtedness, including said Bonded Courthouse Debt, and for no other purpose.

XVII.

That the original owner and purchaser of said bonds, especially mentioned and described herein, and the coupons attached thereto, and on which this action was based, was never a citizen or resident of the State or Territory of Idaho, and was, at the time of his selling and transferring the same to the assignor and grantor of plaintiff, a resident and a citizen of the State of Washington, and this action might have been maintained in this court to recover the judgment herein demanded, if no assignment or transfer had ever been made of said bonds and coupons and claim herein particularly described and alleged to be owned by this plaintiff.

XVIII.

That the said Alturas county above referred to, down to the 7th day of March in the year 1889, embraced a territory of 15,120 square miles, had a voting population of 3500 electors, and an assessment roll of $3,837,362.06, that after the said division of said Alturas county in 1889, Alturas county was left with an area of 3,652 square miles, consisting mostly of mountains and lava beds, and containing no agricultural lands; had a voting population of 576 electors in the year 1894, and an assessment roll in the same year of $635,561.76, and was left with an indebtedness of over $400,000, including the said Bonded Courthouse Indebtedness, upon which plaintiff's claim herein is based under provisions of said act creating Blaine county, on account of which the said county of Al-

turas and the people and officers thereof declared that said Alturas county was unable to pay said indebtedness, and refused to levy any tax to pay said bonds and coupons, or to do any other act to provide for the payment of said Bonded Courthouse Indebtedness, and continued so to neglect to make any provision for the payment of the same down to August 4, 1894, when, under and by reason of the mandate of the Supreme Court of the State of Idaho, Alturas county assumed and promised to pay the said Courthouse Indebtedness, and thereafter the said indebtedness was recognized by the said Alturas county as its sole indebtedness; but said county made no provision for any payment of same, and claimed to be unable to pay same, and asked that the county be abolished by the Legislature of the State of Idaho.

The assessed valuation of Alturas county for each year from 1883 to the last one before its abolishment is as follows:

For the year 1883, $2,871,365.57.

For the year 1884, $3,015,336.61.

For the year 1885, $3,424,513.68.

For the year 1886, $3,322,431.71.

For the year 1887, $3,696,600.62.

For the year 1888, $3,837,362.00.

For the year 1889, $814,387.00.

For the year 1890, $649,104.00.

For the year 1891, $666,282.00.

For the year 1892, $604,144.00.

For the year 1893, $707,214.76.

For the year 1894, $635,561.76.

The above assessments are taken from the records of

same in office of State auditor, and with the great indebtedness of Alturas county was presented to the Legislature with petition to organize Blaine county and place burden of debt on a county able to pay same.

The officers and people of Alturas county placed on the desk of every member of the State Legislature, and upon the table of every officer of the State, a printed pamphlet petition signed by their representatives and senator, showing these items, and that the debt of Alturas county equaled 70 per cent of its actual value, and asked that its property and its liabilities be legislated upon a new county to be called Blaine.

By an act of the Legislature passed March 5, 1895, entitled "An Act to abolish the counties of Alturas and Logan, and to create and organize the county of Blaine," said Alturas county was abolished and ceased to exist; the county of Blaine was created, having a territorial area of 9,520 square miles, a voting population of 1,800 and an assessed valuation, as by the assessment rolls of 1894, of $2,410,688.72; and a large portion of said county of Blaine is valuable farming and agricultural lands; and upon the said County of Blaine, by the act creating the same, was legislated all the indebtedness of Alturas county, embracing the said Courthouse Bonded Indebtedness; and it was enacted that the said county of Blaine should assume and pay the same; and thereafter the said county of Blaine did assume and promise to pay the same.

On the 18th day of March, 1895, the Legislature of Idaho created out of the then county of Blaine, the county of Lincoln, cutting off from Blaine county about 2,600 square miles of territory, and taking 525 of its voting

population, and about $990,000 of its assessed valuation, leaving to Blaine county a territorial area of 6,920 square miles, a voting population of 1,275 male electors, and a tax roll of $1,410,000; and the said act creating Lincoln county provided that Lincoln county should pay its proportionate share, based on said assessed valuation, of the indebtedness of Blaine county, including the said Courthouse Bonded Indebtedness, and gave to said Lincoln county no portion or interest in the resources or debts due to Blaine county, amounting to the sum of $130,000; and since the creation of said Lincoln county such proceedings have been had that Blaine county has a judgment against Lincoln county, as its proportion of said indebtedness, including said Courthouse Bonded Indebtedness, for the sum of $238,446.27, with interest amounting to over $50,000.00; and said Lincoln county is and was by said act made and obligated to pay to the said Blaine county nearly one-half of the said Courthouse Bonded Indebtedness; and no part of said legislative debt due from Lincoln county to Blaine county has been paid; and that Blaine county has assumed the said Courthouse Bonded Indebtedness, and has agreed to pay the same, and has demanded of Lincoln county its proportion of all of the same, as provided for under said act of apportionment of said indebtedness; that Blaine county has never denied its assumption and liability to pay said Bonded Courthouse Indebtedness to plaintiff, and other holders of said bonds prior to or otherwise than the refusal and neglect of the treasurer of Blaine county to pay the indebtedness herein sued for, when demand was made

thereon and therefor within ten days prior to the time of the bringing of this action.

That Lincoln county has not yet paid to Blaine county any portion of said Bonded Courthouse Indebtedness; that when the same is paid it enters into said fund for provision of said bonded debt, among others, and can be used by Blaine county for no other purpose except for the discharging of said debt legislated upon it at time of its creation; and to aid it in payment of same the said proportionate indebtedness was legislated upon Lincoln county at time of its creation, has been claimed by Blaine county, and has been by a competent Court having jurisdiction of the matter and the parties allowed to be due to Blaine county from Lincoln county.

That soon after the said creation of Blaine county, and in March, 1895, former officers of said Logan county and residents and tax payers of such portion of Blaine county as had been theretofore in Logan county, denied the legality of the said act creating Blaine county, and brought suits and proceedings in the Supreme Court of Idaho to have said act declared void and of no effect; and in said suits and legal proceedings the issue was, among others, the legality of placing upon the people and property of what had been Logan county this or any portion of this said indebtedness of Alturas county, and such proceedings were had that the said Court held said act and said provision legal and valid and binding upon all.

In the allegations of this amended complaint, wherein they differ from the original complaint, it is not meant nor intended to be alleged that the cause of action is

based upon any indebtedness other than that originally created by the bonds and coupons herein described, and that subsequently imposed upon the defendant county by the said act.

Wherefore, plaintiff demands judgment against defendant, for the sum of ten thousand five hundred ninety dollars ($10,590), with interest on $9,000, the amount of the claim and principal sum of said bonds, from the first day of November, 1891, at the rate of ten per cent per annum; and like interest on $540, the amount of the face of said coupons No. 7, from the first day of January, 1890; and like interest on $540, the amount of the face of said coupons No. 8, from the first day of January, 1891; and like interest on $440, the amount of the face value of said coupons No. 8, from November 1, 1891; and for like interest on said judgment; and for plaintiff's costs and disbursements in this action.

SELDEN B. KINGSBURY,
Attorney for Plaintiff.

County of Ada. }
State of Idaho, } ss.

Selden B. Kingsbury, being duly sworn, deposes and says: I am attorney for the plaintiff in the above-entitled action; I have read the foregoing complaint and know the contents thereof, and that the same is true of my own knowledge, except as to matters therein stated to be on information and belief, and as to those matters I believe it to be true. My sources of information are books, records, and papers relating to said counties,

and to suits and fiscal matters connected therewith, and the affidavits of plaintiff herein. I make this affidavit for and on behalf of plaintiff, because plaintiff is not in and does not reside in Ada county, where I reside.

SELDEN B. KINGSBURY,

Subscribed and sworn to before me this 28th day of Feb., 1898.

[Seal] A. L. RICHARDSON,
Clerk of U. S. Circuit Court for Idaho.
By H. L. Richardson,
Deputy.

[Endorsed]: No. 136. U. S. Circuit Court, District of Idaho. Frank C. Robertson, Plaintiff, v. Blaine County, Defendant. Amended Complaint. Filed Feb. 28th, 1898. A. L. Richardson, Clerk. By H. L. Richardson, Deputy. Selden B. Kingsbury, Attorney for Plaintiff.

In the Circuit Court of the United States, District of Idaho.

FRANK C. ROBERTSON,
Plaintiff,
vs.
BLAINE COUNTY,
Defendant.

Demurrer to Amended Complaint.

Comes now the above-named defendant and demurs to the plaintiff's amended complaint herein, and as ground of demurrer specifies:

That the said amended complaint does not state facts sufficient to constitute a cause of action.

That the alleged cause of action in said amended complaint set forth is barred by the provisions of section 4052 of the Revised Statutes of the State of Idaho.

Wherefore, defendant prays judgment whether it shall further answer the said amended complaint and for such further orders as may be proper in the premises.

LYTTLETON PRICE,
Defendant's Attorney.

[Endorsed]: No. 136. In the U. S. Circuit Court of the United States, District of Idaho. Frank C. Robertson v. Blaine County. Demurrer to amended complaint. Filed March 1, 1898. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the Central Division of the District of Idaho.

FRANK C. ROBERTSON,
Plaintiff,
vs.
BLAINE COUNTY,
Defendant.

Order Sustaining Demurrer to Amended Complaint.

On this 1st day of March, 1898, this cause came on to be heard upon the demurrer to the amended complaint herein, Selden B. Kingsbury, Esq., appearing as counsel for plaintiff and Lyttleton Price, Esq., for the defendant, and after argument by the respective counsel:

It is ordered that said demurrer be, and the same is hereby, sustained.

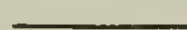
JAS. H. BEATTY,
Judge.

To the order sustaining the demurrer to the said amended complaint, the plaintiff by his counsel, Selden B. Kingsbury, Esq., then and there excepted in due form of law, which exception is hereby allowed.

March 1, 1898.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 136. U. S. Circuit Court, District of Idaho. Frank C. Robertson, v. Blaine County. Order sustaining demurrer to amended complaint and exceptions. Filed March 1, 1898. A. L. Richardson, Clerk.



In the Circuit Court of the United States, in and for the Central Division of the District of Idaho.

FRANK C. ROBERTSON,
Plaintiff,
vs.
BLAINE COUNTY,
Defendant.

Judgment.

This cause came regularly on to be heard upon the demurrer to the amended complaint herein, Selden B. Kingsbury, Esq., appearing as counsel for plaintiff and Lyttleton Price, Esq., for the defendant. After argument by the respective counsel and upon consideration the Court ordered that said demurrer be sustained, and

the said plaintiff by his said counsel declining to further plead in said cause—

It is therefore, by virtue of the law and by reason of the premises aforesaid, ordered and adjudged that said plaintiff take nothing by his complaint, and that the said defendant, Blaine county, do have and recover of and from Frank C. Robertson, the said plaintiff, its costs and disbursements herein expended, amounting to the sum of $20.60, and that execution issue therefor.

Dated March 1st, 1898.

JAS. H. BEATTY,
Judge.

In the Circuit Court of the United States for the District of Idaho.

FRANK C. ROBERTSON,
vs.
BLAINE COUNTY,
} No. 136.

Clerk's Certificate to Judgment Roll.

I, the undersigned clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify that the foregoing papers hereto annexed, together with the bill of exceptions, constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said Court this 1st day of March, 1898.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: In the Circuit Court of the United States for the District of Idaho. Judgment Roll No. 136. Frank C. Robertson v. Blaine County. Register No. 1. Filed March 1, 1898. A. L. Richardson, Clerk.

In the Circuit Court of the United States, District of Idaho, and in the Central Division thereof.

FRANK C. ROBERTSON,
Plaintiff,
vs.
BLAINE COUNTY,
Defendant.

Stipulation and Order Extending Time to File Bill of Exceptions.

March 1st, 1898.

In the above-entitled action the plaintiff may have twenty days in which to prepare and file bill of exceptions.

LYTTLETON PRICE,
Attorney for Defendant.

Plaintiff allowed time as above stipulated.

March 1, 1898.

BEATTY,
Judge.

[Endorsed]: No. 136. In the U. S. Circuit Court of the District of Idaho. Frank C. Robertson v. Blaine County. Stipulation and order extending time, etc. Filed March 1st, 1898. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho and in the Central Division thereof.

FRANK C. ROBERTSON, Plaintiff, vs. BLAINE COUNTY, Defendant.	Plaintiff's Bill of Exceptions.

Bill of Exceptions.

Be it remembered that on the 1st day of March, 1898, this cause came regularly on for hearing before the Hon. James H. Beatty presiding, on the amended complaint and the demurrer to the amended complaint, and the demurrer being before the Court, and being argued by counsel for the respective parties, the matter was submitted for decision of the Court; and the Court being fully advised, rendered its decision on same day, and sustained the said demurrer, and made and entered the following order, to-wit:

"It is ordered that said demurrer be, and the same is, hereby sustained.

JAMES H. BEATTY,

Judge."

To which order sustaining said demurrer counsel for plaintiff then and there duly excepted, and the same was allowed and was written beneath said order as follows: "To the order sustaining the demurrer to the said amended complaint the plaintiff, by his counsel, Selden B.

Kingsbury, Esq., then and there excepted in due form of law, which exception is hereby allowed.

March 1st, 1898.

JAMES H. BEATTY,

Judge."

And thereupon judgment was made, rendered, and entered in favor of defendant and against plaintiff, and is in words and figures as follows:

In the Circuit Court of the United States for the District of Idaho, and in the Central Division thereof.

FRANK C. ROBERTSON,
Plaintiff,
vs.
BLAINE COUNTY,
Defendant.

Judgment.

This cause came regularly on to be heard upon the demurrer to the amended complaint herein, Selden B. Kingsbury, Esq., appearing as counsel for plaintiff, and Lyttleton Price, Esq., for the defendant. After argument by the respective counsel, and upon consideration, the Court ordered that said demurrer be sustained, and the said plaintiff, by his said counsel, declining to further plead in said cause—

It is therefore, by virtue of the law and by reason of the premises aforesaid, ordered and adjudged that said plaintiff take nothing by his complaint, and that the said defendant, Blaine county, do have and recover of and from Frank C. Robertson, the said plaintiff, its costs and disbursements herein expended, amounting to the sum of $20.60, and that execution issue therefor.

Dated March 1st, 1898.

JAS. H. BEATTY,

Judge."

To which ruling, order, decision, and judgment, and to each and all thereof, the plaintiff, by its counsel, then and there duly objected and excepted, and exception allowed.

Wherefore, I, James H. Beatty, Judge, do hereby allow said exception, and this plaintiff's bill of exceptions, and sign, seal, and make the same of record herein.

JAS. H. BEATTY,

Judge.

[Endorsed]: No. 136. In the U. S. Circuit Court, District of Idaho. Frank C. Robertson v. Blaine County. Bill of exceptions. Filed March 1st, 1898. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the District of Idaho and in the Central Division thereof.

FRANK C. ROBERTSON, Plaintiff, vs. BLAINE COUNTY, Defendant.	Stipulation.

Acceptance of Service of Bill of Exceptions.

I hereby acknowledge service of the bill of exceptions, waive time, and make no objection to the settling and allowance of the same at once.

Dated March 1st, 1898.

LYTTLETON PRICE,
Attorney for Defendant.

[Endorsed]: No. 136. U. S. Circuit Court, District of Idaho. Frank C. Robertson, v. Blaine County. Acceptance of service of copy of bill of exceptions. Filed March 1st, 1898. A. L. Richardson, Clerk.

In the Circuit Court of the United States in and for the District of Idaho.

FRANK C. ROBERTSON,
Plaintiff,
vs.
BLAINE COUNTY,
Defendant.

Petition for Writ of Error.

The above-named plaintiff, Frank C. Robertson, conceiving himself aggrieved by the decision, order, and judgment of this Court made, rendered, and entered on the first day of March, 1898, in the above-entitled action, doth pray for a writ of error from said decision, order, and judgment to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit of the United States, and prays that a writ of error may be allowed, and that a transcript and record of the proceedings upon which said judgment, duly authenticated, may be sent to the said Court of Appeals for review and for the purpose of having said errors corrected, as shown in the record herein, and as shown by the bill of exceptions and assignments of error filed herewith and made a part hereof.

SELDEN B. KINGSBURY,
Atty. for Petitioner.

Order Allowing Writ of Error.

On consideration of the foregoing petition, and the assignment of errors accompanying the same, it appearing that this is a proper cause therefor, it is ordered that the

said writ of error be allowed as prayed; and the said petitioner is required, before the issuance of said writ, to file his bond for the costs thereof, according to law, in the sum of $500.00.

JAS. H. BEATTY,

Judge Presiding as Circuit Judge.

[Endorsed]: No. 136. In the U. S. Circuit Court for the District of Idaho. Frank C. Robertson, v. Blaine County. Petition for writ of error and order allowing same. Filed March 17th, 1898. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho.

FRANK C. ROBERTSON,
Plaintiff,
vs.
BLAINE COUNTY,
Defendant.

Assignment of Errors.

Comes now the plaintiff, Frank C. Robertson, and upon the record of this action assigns the following errors committed by the Circuit Court to his prejudice, to-wit:

First.—The Court erred in its conclusion of law in holding and deciding that the amended complaint herein does not state facts sufficient to constitute a cause of action,

and in sustaining the demurrer to the said amended complaint.

Second.—That the Court erred in holding and deciding that the cause of action set forth in the amended complaint was, at time of bringing this action, barred by the provisions of section 4052 of the Revised Statutes of Idaho, and in sustaining the demurrer to the amended complaint herein.

Third.—That the Court erred in sustaining the demurrer to the amended complaint herein.

Fourth.—That the Court erred in holding and deciding and ordering that the plaintiff take nothing by this action, and that defendant have judgment against plaintiff for costs.

SELDEN B. KINGSBURY,
Attorney for Plaintiff.

[Endorsed]: No. 136. In the Circuit Court of the United States for the District of Idaho. Frank C. Robertson v. Blaine County. Assignment of errors. Filed March 17th, 1898. A. L. Richardson, Clerk.

Bond on Writ of Error.

Know All Men by These Presents, that we, Frank C. Robertson, as principal, and Peter Sonna and Frank R. Coffin, as sureties, are held and firmly bound unto Blaine county, a public corporation, and county of Idaho in the full and just sum of five hundred (500) dollars, to be paid to the said Blaine county, its certain attorney, executors,

administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, lately at a Circuit Court of the United States, for the District of Idaho, in a suit depending in said court between said Frank C. Robertson as plaintiff and said Blaine county as defendant, a judgment was rendered against the said Frank C. Robertson, and the said plaintiff Frank C. Robertson having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant. Blaine county, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, on the 15th day of April next.

Now, the condition of the above obligation is such, that if the said Frank C. Robertson shall prosecute said writ of error to effect, and answer all damages and costs, if he fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

FRANK C. ROBERTSON,
By S. B. KINGSBURY, his Atty. [Seal]
PETER SONNA. [Seal]
FRANK R. COFFIN. [Seal]

United States of America, }
District of Idaho. } ss.

Peter Sonna and Frank R. Coffin, being duly sworn, each for himself, deposes and says that he is a householder in said District, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

PETER SONNA,
FRANK R. COFFIN,

Subscribed and sworn to before me this 17th day of March, A. D. 1898.

A. L. RICHARDSON,
Clerk of U. S. Circuit Court District of Idaho.

[Endorsed]: No. 136. United States Circuit Court for the Ninth Circuit, District of Idaho. Frank C. Robertson v. Blaine County. Bond on writ of error. Form of bond and sufficiency of sureties approved. Beatty, Judge. Filed March 17th, 1898. A. L. Richardson, Clerk.

Citation.

United States of America—ss.

The President of the United States, to Blaine County, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the

Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 15th day of April next, pursuant to a writ of error in the clerk's office of the Circuit Court of the United States for the District of Idaho, wherein Frank C. Robertson is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at Boise City, in said District, this 17th day of March, 1898.

[Seal] JAS. H. BEATTY,

Judge.

Attest:

A. L. RICHARDSON,

Clerk.

Service of the foregoing citation by copy admitted this 22d day of March, 1898.

LYTTLETON PRICE,

Attorney for Defendant in Error.

[Endorsed]: Filed March 23d, 1898. A. L. Richardson, Clerk.

Writ of Error.

United States of America—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Frank C. Robertson, plaintiff in error, and Blaine county, defendant in error, a manifest error hath happened, to the great damage of the said Frank C. Robertson, plaintiff in error, as by his complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 15th day of April next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, the 17th day of March, A. D. 1898.

[Seal] A. L. RICHARDSON,

Clerk of the United States Circuit Court for the District of Idaho.

[Endorsed]: Filed March 23d, 1898. A. L. Richardson, Clerk.

Service of the within writ of error by copy admitted this 22d day of March, 1898.

LYTTLETON PRICE,
Attorney for Defendant in Error.
S. B. KINGSBURY,
Attorney for Plaintiff.

Order to Transmit Record.

And thereupon it is ordered by the Court here that a transcript of the record and proceedings in said cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

[Seal] A. L. RICHARDSON,
Clerk.

In the Circuit Court of the United States for the Central Division of the District of Idaho.

FRANK C. ROBERTSON,
vs.
BLAINE COUNTY.
} No 136.

Clerk's Certificate to Transcript.

I, A. L. Richardson, clerk of the Circuit Court of the United States, in and for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 70, inclusive, to be a full, true, and correct copy of the pleadings and proceedings in the above-entitled

cause, and that the same together constitute the return to the annexed writ of error.

I further certify that the cost of said record, amounting to the sum of $42.40, has been paid by the said plaintiff in error.

Witness my hand and the seal of said Court affixed at Boise, Idaho, this 23d day of March, 1898.

[Seal] A. L. RICHARDSON,

Clerk.

[Endorsed]: No. 441. In the United States Circuit Court of Appeals for the Ninth Circuit. Frank C. Robertson, Plaintiff in Error, v. Blaine County, Defendant in Error. Transcript of Record. Error to the Circuit Court of the United States for the District of Idaho, Central Division.

Filed March 28, 1898.

F. D. MONCKTON,

Clerk.

By Meredith Sawyer,

Deputy Clerk.

441

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRANK C. ROBERTSON, Plaintiff in Error,

vs.

BLAINE COUNTY, Defendant in Error.

In Error to United States Circuit Court for the District of Idaho.

BRIEF OF PLAINTIFF IN ERROR.

SELDEN B. KINGSBURY,
Attorney for Plaintiff in Error.

FILED
APR 25 1898

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRANK C. ROBERTSON, Plaintiff in Error,

vs.

BLAINE COUNTY, Defendant in Error.

In Error to United States Circuit Court for the District of Idaho.

BRIEF OF PLAINTIFF IN ERROR.

Statement.

This action was begun in the Circuit Court for the District of Idaho on the 30th of September, 1897. A demurrer to the complaint was sustained and thereafter the amended complaint was filed and a like demurrer being filed thereto, on the first day of March, 1898, the cause came on for argument, was heard and submitted. The Court sustained the demurrer and ordered judgment for defendant, which was thereupon made, rendered, and entered.

There appears on pages 34 and 35 of the record a motion to strike out the amended complaint; but, as appears on page 35 of the record, this motion was withdrawn by defendant.

It will also be noted that the Court below, on sus-

taining the demurrer to the original complaint, made and filed its opinion (p. 22 of record), and that afterwards the amended complaint having been filed, and the same demurrer having been interposed thereto, and having been argued and submitted, the Court made the same decision as before and on the same opinion, stating: "It is not found that the amendments to the complaint justify a change * * " (Record, p. 32.)

To the order sustaining the demurrer and to the decision and order for judgment the plaintiff then and there duly excepted; the exceptions were allowed, and made part of record, and were also preserved in a bill of exceptions then and there settled and allowed and made part of record. (Record, pp. 66, 67, 68, 69.)

The proceedings are brought here for review on writ of error.

Questions Involved.

This action is for the collection of a claim based upon a portion of a bonded debt of a county, incurred for the purpose of raising a fund to build a court house and jail.

To the complaint the defendant interposed a general demurrer, and also Section 4052 of the Revised Statutes of Idaho, (Record, pp. 61. 62.) which section, in prescribing the time within which suits may be brought, reads as follows:

"Sec. 4052. Within five years: An action upon any contract, obligation, or liability founded upon an instrument in writing."

The position of the defendant on the demurrer was, that as this bonded indebtedness all became due November 1st, 1891, the above section applied, and the

cause of action was barred; and the Court below was of that opinion.

Plaintiff in error contends that the above provision of law does not apply:

First. Because the duty of providing for and paying this debt was so imposed and assumed as to make the debtor county the donee of a power and a trustee of a direct, express, and continuing trust, unaffected by the statute of limitations.

Second. Because the act authorizing and requiring the creation of this debt provided for the levy of a special tax and created a special fund, which tax was never levied and which fund never contained any moneys; nor was any money ever in the treasury of the debtor county applicable to the payment of this debt.

Third. Because of new promises; of renewal of the indebtedness; of many subsequent acknowledgments of the debt; and because of the creation of a new legislative obligation and debt upon the defendant county, based upon the original debt, and into which the original debt is merged.

Fourth. Because, of the new promises and acknowledgments embraced in and implied in legislative acts and legal proceedings thereunder; of the making provision for the payment of said indebtedness; of the apportioning the same and creating legislative debts upon other counties than the debtor county to aid the debtor county in the payment of the same.

Fifth. Because of statutory provisions requiring a new county to pay its proportionate share of any bonded indebtedness outstanding against the parent county and requiring such payments to be used only in aid of paying such bonded indebtedness: and be-

cause of various acts, suits and proceedings done, instituted and undertaken by the debtor county to secure aid from other counties in obtaining funds on account of and for payment of this indebtedness.

Sixth. Because of the various acts of the Legislature regarding said indebtedness; regarding the county which created the same; regarding other counties created out of said county; regarding the funding of the indebtedness; regarding the apportionment of the indebtedness; and because of acknowledgments and promises made and necessarily implied in various suits, actions, and legal proceedings had and taken concerning said indebtedness by the defendant county, and the results of the same, as appears in the history of said indebtedness.

History of Indebtedness.

The county creating this indebtedness and issuing its negotiable coupon bonds therefor, was Alturas County, in the then Territory of Idaho. It was authorized and required so to do by an act of the Legislative Assembly of Idaho, approved February 8, 1883, and entitled "An act providing for the erection of a court house and jail at Hailey, the county seat of Alturas County."

Special and Local Laws of Idaho, Secs. 421 to 427, pp. 106 to 108.

Record, p. 37.

Sub Sec. 5 of said act provides as follows: "The Board of County Commissioners of said county shall, at time of the levy of county taxes, include therein a levy of sufficient tax to meet the interest and principal of said bonds as the same shall become due. And the

tax so levied shall be known as the Court House Bond Tax, and shall be collected as other taxes are collected, and shall constitute a separate fund, and shall be used for no other purpose. And for the payment of said bonds, principal and interest, all the taxable property of said county is hereby pledged." (Record, p. 38.)

Alturas County at that time embraced an area of 15,120 square miles, had a voting population of 3,500 male electors, and an assessed valuation of $2,871,-365.57.

The assessment of the county for the year 1888 shows a valuation of the county of $3,837,362.06.

After March 7th, 1889, Alturas County was, by divisions, left with an area of 3,652 square miles of mountain peaks and lava flats and was so nearly destroyed as to have, in 1894, an assessed valuation of but $635,561.76, and a voting population of only 576 electors, yet with an indebtedness of 70 per cent. of the actual value of its assessable property.

Record, pp. 49, 55 and 56.

Act dividing Alturas County, see Idaho Session Laws 1888-9, p. 35.

This division of Alturas County, in February, 1889, was so near its destruction that from that time during all its subsequent existence it made no attempt to raise any funds or to do anything towards the payment of its indebtedness; claimed to be unable to do so; and with such claim, and on account of such inability, asked that the county be abolished and that a new county be created out of its former territory and embracing sufficient of its former territory (that

is, its territory before said division), to enable it to pay this and its other indebtedness. (Record, p. 56.)

Meantime, the legality of the division act of 1889 was disputed by Alturas County and was finally determined by the Supreme Court of the United States in Clough vs. Curtis, 134 U. S., 361 (10 Sup. Ct. Rep., 573), on March 17, 1890.

Consequently, and pursuant to the request of the county, the Legislature of Idaho, on the 3d day of March, 1891, passed an act "creating Alta and Lincoln Counties," legislating Alturas County out of existence, giving all of its property and territory to Alta County, and also giving to Alta County over half of what had been the County of Logan, providing that the county seat of Alta County should be at Hailey; and section 7 of said act provided as follows: "All public buildings, records, books, furniture, money, real estate and personal property heretofore belonging to Alturas County shall become the property of Alta County."

Section 9 of said act provided: "All the indebtedness of Alturas County shall be assumed and paid by Alta County."

Session Laws of Idaho 1890-91, p. 120.

The Supreme Court of Idaho, on June 3, 1891, declared said act unconstitutional, on the ground that its purpose, object and effect was to give to Alturas County a portion of Logan County without complying with the constitutional requirement of a vote of the people in the segregated portion.

People vs. George, 2 Idaho, 814.

The above case was finally determined on rehearing

on September 16, 1891, the decision previously rendered being adhered to.

People vs. George, 2 Idaho, 847.

From 1889 down to 1894 Alturas County and the other counties which had been created out of her territory and were by said division act of 1889 required to aid her in the payment of this indebtedness, did nothing towards paying, adjusting, apportioning, or in any manner providing for this indebtedness, as Alturas County was dissatisfied with the provisions for the apportionment provided by the act, and refused to take any steps to make apportionment or allow the same to be made until August 4, 1894, when she and the other counties were commanded by the Supreme Court of Idaho to make such adjustment and apportionment as they were directed to make by the said division act of 1889. (Record, pp. 50, 51.)

Elmore County et al. vs. Alturas County, 37 Pac., 349.

Afterwards and in 1894, the apportionment of the indebtedness of Alturas County was made, and, as made and filed of record in the office of the Recorder of Alturas County, left with Alturas County the obligation of the payment of all of this bonded court house debt, and the same was thereupon assumed and acknowledged by Alturas County as her proper indebtedness. (Record, p. 51.)

On March 9, 1895, the Legislature of Idaho, recognizing the fact that great delinquencies existed as to payments on the apportioned old Alturas debt, passed an act headed, "Apportionment of old Alturas debt," which act amended Section 8 of the said division act of

1889, and, among other things, provided that "In case there shall, by said counties or either thereof at any time be an ommission for any cause to levy the aforesaid taxes or any thereof, it shall be the duty of the of the Boards of County Commissioners of the counties, or county, so omitting to make such levy to ascertain the amount of arrearages of principal and interest then due, and in addition to the amount levied for the payment of the interest then accruing to levy each year a tax for such additional sum as will pay one year's arrearage of interest, or principal, or both, beginning with the first year that said interest, or principal, or both, become delinquent and upaid, and shall continue to levy a similar tax each year and every year until all the arrearages of interest and principal shall be fully paid: *Provided*, that if any of said counties shall so desire they may refund all of said arrearages of interest and principal by the issuance of interest bearing coupon bonds therefor, payable in not less than ten (10) or more than twenty (20) years from the date of issue, bearing interest at not exceeding six (6) per cent. per annum; said bonds to be issued in pursuance of law."

Idaho Session Laws 1895, p. 87.

Said Section 8 before amendment, and now as amended, provided and provides that the moneys received from the new counties shall be "applied only to the payment of the present indebtedness of Alturas County, and the securities into which it has been funded," of which this claim is a portion.

By an act of the Legislature passed March 5, 1895, Alturas County was legislated out of existence, and the defendant county created, with a territory of

9,520 square miles, and with a voting population of 1,800 male electors, and an assessed valuation of $2,410,688.72. This act provided that "All valid and legal indebtedness of Alturas and Logan Counties shall be assumed and paid by Blaine County."

Idaho Session Laws 1895, p. 31.

Record, p. 52.

On the 8th day of March, 1895, the Legislature of Idaho passed an act "concerning funding and refunding county indebtedness," and amendatory of the general Idaho statute upon that subject.

Section 3606 of the Revised Statutes of Idaho, as amended by this act, provides as follows:

"Should any part of a county that has incurred a bonded indebtedness, be cut off, and annexed to another county, or erected into a new or separate county, the Assessor of the county to which the segregated portion is attached, or the Assessor of the new county created as aforesaid, shall upon notice from the Board of County Commissioners of the original county from which such segregated portion was detached, given at the regular session of the board when county and State taxes are levied, collect in said segregated territory, and in addition to the other taxes collected by him for county and State purposes, and at the same time and in the same manner, the tax levied by said Board of Commissioners as herein provided; and the laws of the State relating to the levy and collection of taxes, and prescribing the powers, duties and liabilities of officers, charged with the collection, and disbursement of the revenue arising from taxes, are made applicable to this act. The money collected by the Assessor as aforesaid, shall be paid over by the Treas-

urer of the county collecting it, to the Treasurer of the county losing the said territory, and for the purposes herein directed, but such segregated territory so attached to another county, or erected into a new county shall be relieved of the annual tax, levied as provided in the foregoing section, when the county acquiring the same, or the new or separate county pays to the county losing the territory that proportion of the whole indebtedness, together with legal interest thereon, that the assessed value of property in the segregated territory, bears to the assessed value of the property in the whole county, as constituted before the division or segregation thereof."

Session Laws Idaho 1895, Sec. 3606, p. 59.

On March 9, 1895, the Legislature of Idaho passed an act "To annex a part of Blaine County to Custer County," Section 2 of which act provided "that the part of the territory herein proposed to be stricken off from Blaine County shall be held to pay its relative proportion of all the liabilities of said Blaine County existing at the time the vote on such division shall be canvassed and the result officially declared by the Commissioners of Custer County."

Idaho Session Laws 1895, p. 142.

On March 18, 1895, the Legislature of Idaho created out of a portion of the County of Blaine the County of Lincoln, cutting off from Blaine County about 2,600 square miles of territory, taking 525 of its voting population, and about $990,000 of its assessed valuation, thereby leaving to Blaine County a territorial area of 6,920 square miles, a voting population of 1,275 male electors, and an assessed valution of $1,410,000.

Idaho Session Laws 1895, p. 170.

Record, pp. 53 and 54.

Said act creating Lincoln County provided that it should hereafter, and in ten annual installments, pay its proportionate share of the indebtedness of Blaine County, including said court house bonded indebtedness, but it gave to Lincoln County no portion of or interest in the resources of or moneys due to said Blaine County, amounting at that time to the sum of $130,000.

Since the creation of Lincoln County such proceedings have been had that Blaine County has recovered a judgment against Lincoln County for its proportion of said indebtedness, including said court house bonded indebtedness, for the sum of $238,446.27, besides interest from the 18th day of March, 1895, amounting to over $50,000.

Blaine County vs. Lincoln County, 52 Pac., 165.
Record, p. 58.

Lincoln County was by said act obligated to pay Blaine County nearly one-half of said court house bonded indebtedness. This has been claimed by Blaine County of Lincoln County and judgment for the same has been awarded in said action to Blaine County since the bringing of this action, but before the filing of the amended complaint.

Lincoln County has not yet paid to Blaine County any portion of the debt legislated upon it in favor of Blaine County (including said court house bonded indebtedness), and when the same is paid the said act provides that the moneys received from Lincoln County shall be used for no other purpose by Blaine County except for the discharge of the said inherited indebtedness of Blaine County, including said court house bonded indebtedness. (Record, p. 59.)

We quote from Section 7 of said act: "The money so received by Blaine County, shall be by it applied only to the payment of the present indebtedness of Blaine County and the securities into which the same is funded."

And Section 8 of said act provides: "The Treasurer of Blaine County must apportion to the credit of said redemption fund all moneys received by him from Lincoln County in payment of warrants herein provided for, and pay the same out only for the redemption and payment of outstanding indebtedness of Blaine County or the securities into which it has been or may be funded or refunded."

Idaho Session Laws 1895, pp. 173 and 174.

Bingham County not having paid over to Alturas County or to Blaine County its proportionate share of the indebtedness of old Alturas County, under the provisions of the division act of 1889 (which, when paid, could only be used in payment of indebtedness, including this court house debt), it was ordered so to do by the Supreme Court of Idaho, on March 13, 1897.

Blaine County vs. Smith et al., 48 Pac., 286.

After the creation of Lincoln County, Blaine County and Lincoln County proceeded, by accountants, to apportion the indebtedness of Blaine County between the Counties of Blaine and Lincoln. These accountants were appointed in April, 1895, and entered upon their duties for the adjustment of the indebtedness in May, 1895, at Hailey, the county seat of Blaine County. They were, among other things, to adjust all the indebtedness of Alturas County which had been assumed by and legislated upon Blaine County, in-

cluding said court house bonded indebtedness, and in these proceedings Blaine County put in for adjustment the said court house bonded indebtedness, and the same was allowed by the accountants, and their report, filed in June, 1895, with the Auditor of Blaine County and the Auditor of Lincoln County, required Lincoln County to pay Blaine County a large portion of the same to aid Blaine County in the payment of its said indebtedness.

Blaine County rejected the findings of the accountants, and by resolution of its Board of County Commissioners, made and entered on the 15th day of August, 1895, authorized competent accountants to make examinations and computations and a report that would show the actual amount, and the basis for the same, due from Lincoln County to Blaine County as its proportion of said indebtedness. Under this order and appointment a report was made and filed of record with the Auditor of Blaine County, and was made the basis of that certain action wherein Blaine County was plaintiff and Lincoln County was defendant, which action was brought by Blaine County, October 18, 1895, and finally determined by the decision of the Supreme Court of Idaho February 25th, 1898.

52 Pac. Rep., 165.

Record, pp. 58, 59.

In the report made for and by the order of Blaine County, and in the complaint filed in said action of Blaine County against Lincoln County, Blaine County demanded to have apportioned, as a debt which she had assumed, the "Alturas court house bonded indebtedness," specifying by number and proper description the identical bonds and coupons, the basis of the

amount herein demanded; and the same was allowed by the Court and included in the judgment rendered in said act, and now held by Blaine County against Lincoln County. (Record, p. 58.)

The question of the legality of legislating this old Alturas indebtedness upon the people of that portion of Blaine County which had been Logan County was litigated, among others, in the actions brought to test the validity of the act creating Blaine County, and decided by the Supreme Court of Idaho in those actions, respectively entitled:

Wright vs. Kelly et al., 43 Pac., 565, Dec. 31. 1895.

Bellevue Water Co. vs. Stockslager, Judge, 43 Pac., 568, Dec. 31, 1895.

Blaine County vs. Heard, Probate Judge, like decision.

Blaine County vs. Martin, Clerk, like decision.

Record, p. 59.

It is of the political and judicial history of Idaho that since the division act of 1889, which nearly destroyed Alturas County and left, with little aid from the new county, the vast indebtedness created prior to 1889 upon what remained of the old county, that there began and continued incessant litigation and constant appeals to the Legislature and to the courts for relief. The division act of 1889 was tested in four suits in the District Courts of the Territory, two in the Supreme Court of the Territory, and two in the Supreme Court of the United States.

There was refusal, over five years' delay, and there were two suits in the Supreme Court of the State in getting any adjustment on the apportionment made by that act. There have been in the State Courts four

separate and distinct actions concerning the indebtedness of old Alturas County; also four in the Federal Courts concerning the same matter, in one of which His Honor Judge Gilbert presided. (Savings and Loan Ass'n vs. Alturas Co., 65 Fed. Rep., 677.) Two actions were pending in the Federal Court at the time Alturas County was abolished, and three in the State Courts.

Before every Legislature since 1889 bills and measures of relief for the insolvent Alturas County have been pressed, and two Legislatures have passed bills abolishing the county and creating one large enough to assume and carry the burden, and these legislative acts have been followed by six actions finally determined by the Supreme Court of the State of Idaho, and many other suits and legal proceedings, and legislative and political actions, all because of a large debt left upon a weak county, until finally the Blaine and Lincoln acts, and the funding and apportioning acts, passed in 1895, have stood the judicial test and are adjudged law. The purpose, object and effect of the creation of Blaine County was to make a public corporation able to bear this burden of debt and to place the debt upon it.

And in the subsequent act creating Lincoln County care was taken not only not to weaken but to strengthen the debt-paying power of Blaine County.

Of all this history, courts in the District of Idaho will take judicial knowledge, as it is legislative, judicial, political and governmental.

Specifications of Error.

The plaintiff in error will rely upon the following errors:

1. The Court erred in sustaining the demurrer to the amended complaint.

2. The Court erred in sustaining the demurrer to the amended complaint, either for the reason that the amended complaint does not state facts sufficient to constitute a cause of action, or for the reason that the action is barred under the provision of Section 4052 of the Revised Statutes of Idaho.

3. The Court erred in sustaining the demurrer to the amended complaint and ordering judgment in favor of defendant and against the plaintiff.

Argument.

Plaintiff contends that for many reasons this action is not barred, and that if any of these reasons is good and sufficient, then the judgment should be reversed.

We shall endeavor to present these reasons both in their order, singly, each as a sufficient ground, and then also collectively, all as a single ground in their operation and effect.

First, then. The statute of limitations has never commenced to run against this claim, because the law under which the bonds were issued and which entered into the contract pledged all the property of the county for the payment of this bonded debt and created a special fund and provided for the levy of a special tax, to be known as the court house bond tax, to be used for the payment of this indebtedness and for no other purpose; and provided no other means of payment.

Record, pp. 37 and 38.

The county has the pledged property and is the

trustee of the direct, express, continuing trust, and the donee of the power and obligee of the duty to set such governmental wheels in motion as will place in the hands of the County Treasurer this special trust fund to pay this debt; and until that is done the statute of limitations does not begin to run.

The statute authorizing the issue of the bonds provided that "the Board of County Commissioners of said [Alturas] county shall, at the time of levy of county taxes, include therein a levy of sufficient tax to meet the interest and principal of said bonds as the same shall become due. And the tax so levied shall be known as the Court House Bond Tax, and shall be collected as other taxes are collected, and shall constitute a separate fund, and shall be used for no other purpose."

Special and Local Laws Idaho, Sec. 425, p. 107.
Record, p. 37.

The above provision, relating to the special tax and special fund, in the law authorizing the issue of the bonds here in suit, became and is a part of the contract between the county and the bondholders.

Van Hoffman vs. Quincy, 4 Wall., 535.
Mobile vs. Watson, 116 U. S., 289.
Bates vs. Gerber, 22 Pac., 1115-1116.
Ralls Co. vs. U. S., 105 U. S., 733.
Basset vs. City of El Paso, 30 S. W., 893.
Siebert vs. Lewis, 122 U. S., 284.

The authority to tax for the payment of municipal liabilities is in the nature of a trust; the power given becomes a trust which the donor cannot annul and the donee is bound to execute; and the separate fund

to be realized from the taxes levied will constitute a special trust fund.

Morgan vs. Beloit, 7 Wall., 613-618 and 19.
Van Hoffman vs. Quincy, 4 Wall., 535-554 and 5.
Lincoln Co. vs. Lunning, 133 U. S., 529-533.
Parish vs. City, 17 So., 823-824.
Maenhaut vs. New Orleans, 16 Fed. Cases, p. 377 (Case No. 8,939.)

"The law is well settled that the trustee of an express trust cannot invoke the statute of limitations against the *cestui que trust* until he has done some act in open violation or in disaffirmance of the trust."

2 Perry on Trusts, Sec. 863, p. 511.
Lemoine vs. Dunklin Co., 38 Fed., 567-568.
Custer vs. Murray, 5 Johns Ch., 522-531.
Lewin on Trusts and Trustees, p. 580, *p. 729.
Oliver vs. Piatt, 3 How., 411.
Lewis vs. Hawkins, 23 Wall., 119.

The complaint shows that there was no repudiation or renunciation of the trust and no refusal to pay except for want of the trust fund until just before the bringing of this action.

Record, pp. 46 and 47, 58 and 59.

The county, in levying such tax, in receiving and disbursing such tax moneys, acts as a trustee, and "it is a famaliar rule that the trustee of a direct trust, when sued by the beneficiary, cannot interpose the defense of the statute of limitations."

Board of Com'rs vs. Rush, 3 N. E., 165.
State vs. Board, 90 Ind., 359.
Board of Trustees vs. District, 7 S. W., 312.

Underhill vs. Senora, 17 Cal., 172–178.
Parish vs. City, 17 So., 823–824.

The act of 1883 authorizing the issue of the bonds and requiring the levy of the special tax and providing for the placing of the tax in a separate fund, clearly indicates the intention of the Legislature that the power granted should be exercised. In such case "courts will not allow the trust to fail or be defeated by the refusal or neglect of the trustee to execute the power, nor will it be allowed to fail because of any omission of the trustee."

2 Perry on Trusts, Sec. 473, p. 2.

"The office of a trustee is important to the community at large and frequently most so to those least able to take care of themselves. It is one of confidence. The law regards the incumbent with jealous scrutiny, and frowns sternly at the slightest attempt to pervert his powers and duties for his own benefit."

U. P. R. R. Co. vs. Durant, 95 U. S., 576.

The complaint shows that the defendant county, as well as Alturas County, has wholly failed, omitted and neglected to execute the trust imposed and appointed by law.

Record, pp. 47 and 48–56.

Under the law the bonds and coupons here involved were payable out of a particular fund, and, as appears by the complaint, such fund was never provided by the debtor county, although the Legislature has repeatedly recognized and enacted statutes looking to the placing of money in that fund.

Record, pp. 47, 50, 52, 54, 57, 58, 59.

Taxes such as here under consideration, "always constitute a separate fund."

State vs. Townsend, 11 S. W., 747.

"It is a general rule that when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided or the method pursued."

Sawyer vs. Colgan, 102 Cal., 283–292.

Lincoln County vs. Lunning, 133 U. S., 529.

Davis vs. Board, 45 Pac., 982–983.

1 Wood on Lim. (2d Ed.), p. 363.

Underhill vs. Sonora, 17 Cal., 172.

Freehill vs. Chamberlain, 65 Cal., 603–604.

The duty of providing this fund was a continuing one, and "until it was performed the statute of limitations would not apply."

Spaulding vs. Arnold, 26 N. E., 295–297.

To same effect is

City of Atchison vs. Leu, 29 Pac., 467–468.

"When a trust is to be effected by the execution of a power, then the trust and the power become blended and binding upon the donee of the power."

Greenough vs. Willis, 10 Cush., 571–576.

Where a power is coupled with a trust "it is considered a trust for the benefit of other parties" and then "the power becomes imperative and must be executed."

1 Perry on Trusts, Sec. 248, p. 330.

"In addition to the ordinary mode of creating trustees, they may be appointed by special act of the Legislature for the purpose mentioned in the statute creating the trust."

> Wood vs. Board of Supervisors, 2 N. Y. S., 369-374.
>
> Board vs. District, 7 S. W., 312.

The act of February 8, 1883, itself authorizing the issue of these bonds and directing the levy of the special tax and creating the special fund to pay them (Record, pp. 37, 38); the act of 1889, dividing Alturas County and expressly requiring the territory detached from Alturas to pay certain moneys to Alturas to apply on this debt (Record, pp. 49, 50, 51); the act of March 8, 1895, amending the general statutes relating to the levy and collection of certain taxes in new counties to pay the debts of the old or parent counties where new counties were created; the act of March 9, 1895, for the "apportionment of the old Alturas debt" and requiring certain counties formerly detached from Alturas to aid in paying the interest and principal of said debt (Record, pp. 50, 51); the act of March 18, 1895, creating Lincoln County out of a part of Blaine County and requiring Lincoln to pay a proportionate part of this debt (Record, pp. 53, 54), were each "equivalent to a trust deed, * * setting apart property out of which the money due was to be paid at a given time."

> Underhill vs. Sonora, 17 Cal., 172-178.
>
> People vs. Bond, 10 Cal., 563-571.
>
> People vs. Morse, 43 Cal., 534.

On March 5, 1895 (Record, p. 52), Blaine County

was created and was made liable for the debts of Alturas; three days subsequently an act was passed amending the general law of Idaho "concerning funding and refunding county indebtedness." Ten days after the passage of this amendment Lincoln County was created out of a portion of Blaine, which then owed this bonded indebtedness, and was obligated to pay a ratable proportion of the liabilities of Blaine.

Record, p. 53.

The amendment amending the general law of Idaho "concerning funding and refunding county indebtedness," passed March 8, 1895, requires that the moneys collected in newly created counties on account of taxes levied to pay a proportionate part of the indebtedness of the old or parent county, "shall be paid over by the Treasurer of the county collecting it, to the Treasurer of the county losing the said territory, and for the purposes herein directed." (Quoted in full *supra* as Sec. 3606.)

Idaho Sess. Laws 1895, p. 59.

This amendment of the general law, passed prior to the creation of Lincoln County, was binding upon her. By the terms of the amendment not only was Lincoln County required to pay a ratable proportion of the debts of Blaine County, from which she had been detached, but the amendment authorized Blaine County to fix the tax levy necessary to pay interest and principal of her debts, and Lincoln, within her borders, was required to collect the tax so levied and pay the proceeds to Blaine, by whom such proceeds were to be applied to "the payment of her bonded indebtedness, and to no other purpose;" and the power and duty

thus legislated upon the parent county created a trust.

The act of March 9, 1895, relating to the "Apportionment of old Alturas debt," among other things, after providing for the apportionment of the debts of old Alturas County and requiring the several new counties each to pay to Alturas County in warrants its proportionate part of the old Alturas debt, provides: "The money so received from the Counties of Elmore, Logan and Bingham by Alturas County shall be by it applied only to the payment of the present indebtedness of Alturas County and the securities into which it has been funded." And the amendatory act then further provides: "The Boards of County Commissioners of the above named counties shall * * levy also a special tax * * in an amount sufficient to pay the interest on said warrants, and the County Assessor of each of said counties shall pay the amount of said tax to the County Treasurer of Alturas County each year in time * * to meet the payments of interest on the funded debt of said county, as the same shall become due. The Board of County Commissioners of each of said counties * * shall also * * levy a special tax sufficient to pay the principal of said warrants when the same shall become due, * * and year by year shall pay the amounts of such taxes to the County Treasurer of Alturas County, until all of said warrants are paid."

The amendatory act then makes provision for the levy of taxes or the issue of bonds to pay arrearages of interest or principal then or thereafter due, and continuing, says: "All money arising from the collection of taxes or the sale of bonds for the purpose of paying arrearages of principal and interest on said warrants

shall be paid over to the Treasurer of Alturas County in time to enable said county to pay the proportion due from each of said Counties of Logan, Elmore and Bingham upon said funded debt of Alturas County."

Idaho Session Laws 1895, pp. 87, 88 and 89.

Section 5 of the act creating Lincoln County, passed March 18th, 1895, reads: "The indebtedness of Blaine County must be apportioned between the Counties of Blaine and Lincoln in the same ratio that the property of said counties bears to each other and the territory hereby stricken off and erected into the County of Lincoln must be held to pay its ratable portion of the existing liabilities of the County of Blaine from which it is taken."

Idaho Session Laws 1895, p. 171.

Now we again call attention to the fact that at that time, to wit, March 18, 1895, even if there had been no trust relation till then existing between the county and the holders of the Alturas County secureties: even if no acknowledgment or new promise had been made respecting and affecting the Alturas debt, the statute of limitations had not run against the debt here under consideration and which, on the face of the contract, matured November 1st, 1891, only about three and one-third years previously.

It is admitted that at the time Lincoln County was erected out of a part of Blaine. the Court House Debt formed a part of the "valid and legal indebtedness" of Alturas County, which, in the language of the learned District Judge, the Legislature recognized "Blaine should pay."

Record, p. 26.

By the Lincoln County act, on March 18, 1895, the Legislature, in express terms, provided a special trust fund, composed of the moneys received from Lincoln by Blaine, which was sacredly set apart for "the payment of the present indebtedness of Blaine County."

But by the terms of Section 7 of the act it was provided: "Said [County] Commissioners must cause warrants to be issued by the Auditor of Lincoln County in favor of Blaine County to the full amount of the ratable proportion of the indebtednes of said Blaine County, as ascertained and determined in the manner hereinbefore described. Said warrants shall be drawn in sums of not more than five hundred dollars each; shall bear interest at the rate of seven per cent. per annum, from the date of the passage of this act until paid; shall be drawn against a fund to be called 'The Blaine County Redemption Fund,' and shall be registered by the County Treasurer of Lincoln County and be by him delivered to the County Treassurer of Blaine County and must be redeemed by Lincoln County in the following manner: Ten per cent. of the total amount shall be paid in eight years from the date of issue and ten per cent. annually thereafter until all of said warrants are paid. * * * The money so received by Blaine County, shall be by it applied only to the payment of the present indebtedness of Blaine County and the securities into which said debt is funded."

Idaho Sess. Laws 1895, p. 173.

Record, pp. 53, 54.

This provision, at least to the extent of Lincoln County's proportionate part of the debt which Blaine was at that time liable to pay. expressly establishes a

special trust fund, designates the trustee and states the object or purpose of the trust. How apt are the words of the Supreme Court of California in discussing a situation practically identical with that here presented:

"For this purpose a commission is organized; a trust, a trust fund and and trustees were specially created. * * * We consider the act * * * as substantially a trust deed whereby she [City of San Francisco] agrees, on a valuable consideration, to place in the hands of certain trustees so much of her revenue and property, to be applied by the trustees to the redemption of her obligations."

People vs. Bond, 10 Cal., 563.

See also People vs. Morse, 43 Cal., 534.

To quote the language of the Supreme Court of the United States, we say: "It [the act of 1877] provided as it were a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait."

Lincoln County vs. Lunning, 133 U. S., 529-533.

And in this connection we would further say with that Court: "When payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided."

Ib.

Alturas County was, under the act authorizing the issue of the bonds, the original donee of the power to tax and was the first trustee under the act. Alturas

County was abolished and Blaine County was erected instead and was made successor, in ownership of all the property, etc., of Alturas County, and in liability of the obligations of Alturas.

Act of March 5, 1895—Idaho Ses. Laws 1895, p. 31.

Blaine became *eo instante* bound to execute the requirements of the trust.

It is a universal rule that all persons who take through or under the trustee shall be liable to the execution of the trust, and become trustees for the original beneficiary.

Lewin on Trusts & Trustees, p. 279, *p. 270.
2 Pomeroy Eq. Jur., Sec. 1048.
Oliver vs. Piatt 3 How., 333.

There seems to be a marked distinction observed by the courts when considering the matter of trusts, between those wherein only private rights are involved and those wherein the trust relation exists between individuals, on the one side, and the public on the other, in so far as the question of the statute of limitations affecting the trust is concerned.

When the relation is created by statute and the trustee is a public officer, when the duties imposed in the trust are to be performed by the agents of the public, the application of the rule is extended and the good faith of the public, of the State and its constitutent subdivisions is not permitted to be opposed or defeated by any neglect or omission in the performance of trust duties imposed on the officers who are empowered and required to execute the trust. Thus, where money was paid to a town to equalize bounties for soldiers, it was declared to be held in trust for them, and that the

statute of limitations did not run against them in an action to recover the same.

McGuire vs. Linneus, 74 Me., 344.

"These authorities * * show * * that it is not correct to affirm, as is sometimes done, that the statute never runs in the case of a trust. This statement is true of direct, technical trusts, *created by express law*. or by deed or will, but it is not true of implied trusts where there is concurrent equity and law jurisdiction."

Newsom vs. Board of Commissioners, 3 N. E., 163-165.

"The county, in receiving and disbursing school funds, acts as a trustee, and it is a familiar rule that the trustee of a direct trust, when sued by the beneficiary, cannot successfully interpose the defense of the statute of limitations. The trust in this case is a direct one, for the fund is set apart by positive law as a trust fund."

Board of Commissioners vs. State, 3 N. E., 165-166.

The learned District Judge, in the decision of the demurrer, says: "There certainly is nothing in it [the law] which prevented the holder of the bonds after November 1, 1891, from maintaining his action thereon: there never was any fund dedicated specially to the payment of these bonds, nor any special provision for their payment except the general one in the original act before referred to."

Record, p. 31.

We have endeavored hereinbefore to show that the

conclusions of His Honor, as to there being no specially dedicated fund nor any special provision for payment, expressed in the latter part of the above quotation, were erroneous.

Now, as to whether the holder of the bonds might have maintained his action "after November 1, 1891." True it is that an action might have been maintained so far as there was anything in the law "*which prevented*" his doing so. But the only purpose of instituting a civil action is to enforce or protect a right or to prevent or redress a wrong.

The institution and maintenance of an action is a vain proceeding in so far as it fails to furnish an adequate remedy.

Could the "holder of the bonds" have "maintained his action" at any time after November 1, 1891, in a manner that would have afforded him an adequate remedy? If he had sued the county in the State Courts upon the contract, what would have been the result?

Section 1735 of the Revised Statutes of Idaho provides: "Upon presentation to the Board of County Commissioners of a final judgment for money or damages, duly certified, against their county, the board must allow the same and direct its payment as other claims against the county are paid."

Section 2005 of the Revised Statutes provides: "The Auditor must draw warrants on the County Treasurer in favor of all persons entitled thereto, in payment of all claims and demands chargeable against the county, which have been legally examined, allowed and ordered paid by the Board of Commissioners."

Section 14 of Article VIII of the Constitution of

Idaho provides: "No money shall be drawn from the county treasuries except upon the warrant of a duly authorized officer, in such manner and form as shall be prescribed by the Legislature."

Had the holder of the bonds, then, before there was any money in this trust fund, prosecuted his action on the bonds to final judgment, the net result would have been a county warrant, issued to him, the payment of which would have been contingent upon the performance of their duties by all the county officers directly or indirectly connected with the levy, collection and payment of the money on this claim out of the trust fund, for the warrant could be drawn on no other fund. The judgment which would have been recovered by the holder of the bonds would have been valueless except as a voucher to authorize the commissioners to order a warrant drawn, and the warrant that would have been drawn could have been of no benefit until the officers levied and collected the necessary special tax and did all acts required to place the money in the trust fund. Under such conditions, judging from the neglect of the county and its officers to obey the law and make provision for the payment of the coupons and bonds themselves, it could hardly be expected that the circuitous course involved in the securing and enforcing the remedy provided by an action would lead to any result so satisfactory as that of waiting in reliance upon the oft-repeated promises of the Legislature, hereinbefore referred to, relative to the payment of these bonds.

An action for a mandamus against the County Treasurer could have been maintained only when there was money in his hands applicable to the pay-

ment of the bonds, and, as is shown by the complaint, that time has never been.

Record, p. 48.

State *ex rel.* Dickinson vs. Neely, County Treas., 9 S. E., 664–666.

An action for mandamus could have been instituted against the Board of County Commissioners to levy the tax authorized by law for the payment of the coupons and bonds in the State District Court in and for the debtor county.

The Supreme Court of California, respecting this matter, says: "This provisional office of levying the tax being a public duty in the officers of the corporation, cast upon them by the public law, carried with it a legal obligation to discharge it, which might doubtless have been enforced by appropriate proceedings."

Underhill vs. Sonora, 17 Cal., 173–178.

But if an action for a mandamus against the Board of Commissioners had been begun, through a policy of delay, by appeals and other proceedings, under the Idaho procedure, a long time would have necessarily elapsed before a writ could have issued.

Suppose the writ finally issued; the same tedious process would have been required to compel the collection of the tax, and another seige of litigation endured in compelling the payment of the tax as collected, into the treasury by the collector.

As is shown by the complaint, the county utterly failed to act in respect to meeting these obligations as the law directed; not only so, but the county, its people and its officers, felt that under the circum-

stances, with a restricted area, practically without taxable property, and deficient in population, the payment of a debt equal to 70 per cent. of its assessable property was an impossibility. (Record, pp. 51, 55, 56, 57.) There would undoubtedly have been concerted action of the officers, heartily seconded by every taxpayer, to defeat any attempt to enforce payment of the county debt. Mandamus would have been an inadequate remedy.

The words of the Supreme Court of California, in the later case of Freehill vs. Chamberlain, 65 Cal., 603-604, upon this very question, are perfectly in point here. The Court says:

"The contrary view would place it in the power of a municipality in many cases to avoid all payment of its debts, because, if by concert of action each officer should omit to perform his duty, the time consumed in compelling each to perform such duty might be made to consume all the period of the statute before the funds would reach the treasury. We do not think the Legislature intended such result."

Now, as to an action in the Federal Courts. The holder of these securities is not a citizen of Idaho, and in this action against a county of Idaho could invoke the aid of the Federal Courts in the enforcement of the obligations of the county.

Lunning vs. Lincoln County, 30 Fed., 749.

Lincoln County vs. Lunning, 133 U. S., 529.

But in order to set the county in motion for the collection of a tax to place money in the treasury for the payment of this debt by mandamus, a judgment for what is due must be first obtained on the debt. Mandamus does not issue out of the Federal Courts except

in aid of judgments therein rendered. This course the plaintiff is pursuing, and under the authorities and on principle we contend that the statute of limitations will not begin to run until the money is in the trust fund for the payment of the claim, because then, and not till then, he has a direct legal remedy by mandamus against the Treasurer to pay over this trust fund.

High on Ex. Remedies, § 36.
Day vs. Callow, 39 Cal., 593.
Rosenbaum vs. Bauer, 120 U. S., 45.

On page 31 of the Record the learned Judge takes the ground that no trust fund was created by the act authorizing and providing for the payment of this indebtedness, and regarding this law (authorizing the bonds) says: "If that is sufficient to constitute a special fund, or such an express trust as to avoid the operation of the statute, then, as before said, it is virtually a dead letter as to all municipal debtors, for every law authorizing the issue of bonds makes such general provision for their payment, and yet it has been often held that actions upon them become barred by neglect."

As to the danger of the statute of limitations becoming a "dead letter," we have to say, that as we understand the authorities the statute would begin to run when the money was in the trust fund, but not before, for then, and not before, mandamus for the direct payment of the money would lie, and till then no direct action or proceeding of any kind could be resorted to to enforce payment. But again, we note that the learned Judge not only calls the provision for the creation of the fund and for the payment of the debt

"general provision for payment," but says that "every law authorizing the issue of bonds makes such general provision for their payment."

Yet we know of no other law in the district of Idaho that makes just such and only such provision for the payment of any bonds issued thereunder.

Many acts under which bonds have been issued in Idaho, provide for payments of interest and principal of the bonds, out of any moneys in the treasury in case a special fund therefor has not been created, or, if created, is insufficient because of there being no money therein, when payment is due.

As a sample of the class where no special fund was ever created, we cite Sections 11 and 12 of an act "Providing for the issuing and redemption of new bonds," approved January 8, 1875.

"Sec. 11. For the prompt payment of interest of the bonds issued under and by virtue of this act there shall be and is hereby, from and after the first day of December, A. D. 1875, and until the final redemption of such bonds, annually set apart and appropriated from moneys in the territorial treasury an amount sufficient to pay promptly the semi-annual interest on such bonds; and such sum, so set apart and appropriated shall be applied by the Territorial Treasurer exclusively to the payment of such interest on the presentation and surrender of the coupons as aforesaid.

"Sec. 12. From and after the first day of December, A. D. 1880, the Legislative Assembly of Idaho Territory shall by law provide for the setting apart of an annual sum from moneys in the territorial treasury

sufficient to meet the payment of the principal of said bonds at their maturity."

Special and Local Laws Idaho, p. 11, Secs. 17 and 18 (Sec. 11 and Sec. 12.)

As a sample of another class, we cite act of February 5, 1889, providing for the construction of a wagon road, and authorizing the issue of bonds therefor, Section 20 of which act is as follows:

"If at any time there shall not be sufficient moneys in said road fund to pay the interest coupons or the principal of such bonds when due, the Territorial Treasurer shall pay the same out of the general fund of the Territory, and shall replace the amount, so paid, out of the road fund whenever moneys intended for said fund shall be received."

Idaho Sess. Laws, 15th Sess., 1889, p. 31.

As a further example of this class, we cite the act of Feb. 2d, 1885, providing for the erection of a capitol building. Section 7 thereof provides a special fund, out of which the bonds are to be paid, but Section 8 provides: "Sec. 8. If at any time there shall not be sufficient moneys in said capitol building fund to pay the interest or the principal of such bonds when due, the Territorial Treasurer shall pay the same out of the general fund of said Territory, and shall replace the amount so paid out of the fund last named, whenever moneys derived from licenses shall be received."

Special and Local Laws of Idaho, p. 17, Sec. 39, (Sec. 8.)

Another act of the same class is that of February 16, 1893, relating to a state wagon road. Section 18 there-

of provides a special tax, the proceeds of which shall constitute a "separate and distinct fund to be known as the road fund" (exactly like the law of 1883, providing for the bonds here in suit) but Section 19 thereof provides: "If at any time there shall not be sufficient moneys in said road fund to pay the interest coupons or the principal of such bonds when due, the State Treasurer shall pay the same out of the general fund of the State, and shall replace the amount so paid out for the road fund whenever moneys intended for said fund shall be received."

Idaho Session Laws 1893, p. 31.

And here we wish particularly to call attention to the fact that, as is shown by the extracts from the laws last above given, it is usual to provide a special fund, but almost invariably such provision is supplemented with another which requires that if for any reason the special fund has not in it sufficient money to meet the liabilities payable out of it when due, then as a further security to the creditor the general fund is made at once available for the purpose of promptly meeting the public obligations. Not so, however, is it in regard to the act authorizing the bonds here involved and providing for their payment. Here the creditor has the special fund and nothing else to look to. Here he must rely upon the faithful performance of duty by the trustee without having an alternative mode of getting his money provided in case the trustee is unfaithful to his trust.

Wherever money could be taken from the general fund, there mandamus would lie directly to the Treasurer in the first instance, for money is presumed to be there; but not so in case of a special fund.

NEW DEBT CREATED BY STATUTE.

Second: *New legislative debt.* When Blaine County was created there was legislated upon it an indebtedness. The creative act provides: "Sec. 7. All the valid and legal indebtedness of Alturas and Logan Counties shall be assumed and paid by the County of Blaine."

Session Laws Idaho 1895, p. 33.

That this Court House Bonded Debt was then of the "valid and legal indebtedness" of Alturas County is not questioned. This claim is a portion of the legislative debt created with and upon Blaine County. It is of the nature of a specialty and would be such whether created by statute or by operation of law.

Angell on Limitations, Sec. 80, p. 76, Title. SPECIALTIES.

Under the laws of Idaho the statute of limitations may run against a specialty, but it will begin to run not prior to the date of the creation of the specialty. Hence, we say, the legislative debt, the new obligation on Blaine County, the new debt, so far as the obligor is concerned, came into existence March 5, 1895, and if the statute of limitations has begun to run against it (which we deny, as there has been no money in the trust fund), it began to run March 5, 1895, the date of the creation of this legislative debt; and this is equally true whether it be a legislative debt, or whether it arose by operation of law, as in either case it is in the nature of a specialty.

Bullard vs. Bell, 1st Mason (Cir. Co.) R., 243.

This action may be regarded as not a suit upon a

contract made by the defendant, in which, at common law, *indebitus assumsit* would lie; but the obligation of payment is rather in the nature of a specialty at common law, where an action of debt would lie. There is a legal liability to pay a certain definite sum of money, independent of any promise on the part of the defendant, and "if there exists a duty sufficient to raise a promise, then it is sufficient to sustain an action of debt."

We quote from Van Hook vs. Whitlock, 3 Paige Chancery Rep., 409, from p. 416: "Whenever a statute imposes a legal obligation upon one party to pay money to another, the person to whom the payment is to be made may maintain an action for debt for the money."

"All valid and legal indebtedness of Alturas and Logan Counties shall be assumed and paid by the County of Blaine."

We contend that then and there, *eo instante* and *eo nomine*, what had been the valid and legal indebtedness of Alturas County and of which the bonds here under consideration formed a part, became a debt of Blaine County.

In name, *prima facie*, the bonds here in suit are not obligatory upon Blaine County, and aside from that statute of March 5th, 1895, there is nothing in terms fixing responsibility upon the defendant county for this debt. Against Blaine County, *eo nomine*, there is no liability here independent of the statute. But in terms by that act the debt was legislated upon Blaine County, *eo nomine*, and the debt so legislated upon her is a "liability created by statute." This action was begun within less than three years after this legislative debt was created.

"The indebtedness, if any, is one wholly created by statute. * * It was then and there the creation * of * * a legal obligation upon Yellowstone County to pay. * * The Legislative Assembly had the power to create and did create the indebtedness."

County of Custer vs. County of Yellowstone, 9 Pac., 586-590 and 91.

"It [the act of the Legislature] had the effect to impose a liability upon the new township. * * It was within the power of the Legislature to impose such a liability, and it was clearly its intention to do so."

Board vs Thompson, 61 Fed., 923.

"The debt was fixed by the Legislature."

Board vs. Board, 25 Pac., 508-510.

"The obligation to pay the debts of the district was imposed upon the town by a public law, * * and did not require any promise or consent of the town to give it effect."

Whitney vs. Stowe, 111 Mass., 368-372.

In a case involving the statute of limitations applicable to liabilities created by statute, the Supreme Court of California said: "The act first cited casts this duty of bringing suit on county claims on the District Attorney. This duty is not cast by contract, but by the law, and the same law provides the compensation, or, in other words, creates the liability upon the part of the county to pay the compensation. * * The liability may be said, therefore, to come exclusively from the statute—to be created by it."

Higby vs. Calaveras County, 18 Cal., 176-179.

"The Legislature, by that act, created a corporate obligation * * against Lake County; and as it provided no particular mode of enforcing it, it follows that an action at law is the proper remedy."

Grant County vs. Lake County, 21 Pac., 447–449.

"If the debts were actually due from the corporation at the time of its dissolution, it can make no difference whether they were due from the corporation by judgments, or specialty, or only by simple contract. *The right of action against the stockholders is founded upon the statute;* and the form of the action against them must be the same, whatever may be the nature of the original indebtedness of the corporation. * * The Revised Statutes require all actions of debt founded upon any contract, obligation or liability, not under seal, except such as are brought upon judgments and decrees, to be commenced within six years. This would embrace the present suit founded upon a *liability created by statute.*"

Van Hook vs. Whitlock, 3 Paige Ch., 409–415 and 416.

"The liability of sureties on an official bond is a statutory liability and an action upon such a liability is barred in three years."

Ada County vs. Ellis (Idaho), 48 Pac., 1071.

Revised Statutes, Sec. 4054, Subdiv. 1 (see quoted *infra*).

Canyon Co. vs. Ada Co., 51 Pac., 748–750.

"A swamp land assessment is a charge imposed * *

by authority of the Legislature, and is thus clearly a liability created by statute."

People vs. Hubert et al., 12 Pac., 43.

City and County of San Francisco vs. Jones, 20 Fed., 188.

Operation of Law.

Certainly the obligation of Blaine County to pay this indebtedness is either one created by statute, or is one which arose by operation of law, or by both.

Is it by operation of law independent of the statute? Blaine County, having come into possession of all the property, territory and population of Alturas County, would have been bound by the obligations of Alturas County by operation of law.

1 Dillon Mun. Corp., Secs. 171, 172, 173.

Mount Pleasant vs. Bechwith, 100 U. S., 514.

Broughton vs. Pensacola, 93 U. S., 266.

Mobile vs. Watson, 116 U. S., 289.

The Idaho statute of limitations does not in terms prescribe a period of limitation for actions for relief in cases where the right of action arises by "operation of law."

Now, if the liability of Blaine County were not one expressly "created by statute," and therefore subject to the three year limitation provided in Section 4054 of the Revised Statutes of Idaho, but is a liability arising by operation of law without being, in terms, created by statute, then the period of limitation applicable to the case would be that prescribed by Section 4060, which reads: "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued."

Revised Statutes Idaho, Sec. 4060.

As we have before shown, if the act creating Blaine County had not specifically provided that Blaine County "shall assume and pay" all the valid and legal indebtedness of Alturas County, still, by operation of law, the liability for such indebtedness would have attached and Blaine would have been liable. If, then. this debt be considered one arising by operation of law and falling within the provisions of Section 4060, it is not barred for the reason that four years from the time Blaine was created had not elapsed when this action was commenced.

Section 4052 of the Revised Statutes of Idaho, interposed by defendant, does not apply, and the demurrer was therefore insufficient to raise the question of the statute of limitations in this action.

Section 4052 relates to limitations governing in cases of an "action upon any contract, obligation or liability founded upon an instrument in writing."

The section of the law governing the time for commencing an action upon a liability created by statute is Section 4054. which provides:

"Within three years: 1. An action upon a liability created by statute, other than a penalty or forfeiture."

Relative to pleading the statute of limitations, the Revised Statutes of Idaho provide, Section 4213: "In pleading the statute of limitations it is not necessary to state the facts showing the defense. but it may be stated generally that the cause of action is barred by Section ——(giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish on the trial the facts showing that the cause of action is barred."

Defendant having pleaded Section 4052, it is confined to that section, and no other section is pleaded.

Thomas vs. Glendenning, 44 Pac., 652.

Bank vs. Wickersham, 34 Pac., 444.

That the obligation of Blaine County to pay was neither one imposed by the legislative act, nor one arising by operation of law, seems to be the position of learned counsel for defendant. It seems to us that the defense, as its position is shadowed forth on page 26 of Record, does not distinguish between the obligation and the *nature* of the obligation; between the liability to pay a certain debt and the manner in which the liability was created. Blaine was to pay the same debt, but for a different reason. Her obligation arose in a different manner. The inception of the debt of Alturas was the making the contract; the inception of Blaine's obligation to pay was the legislative act. And counsel seems in this position to seek support in Section 8 of the act creating Blaine County, which provides that "All actions, prosecutions and legal proceedings of all kinds whatsoever, now pending in either Alturas or Logan County shall be continued, maintained and prosecuted in the new County of Blaine; all rights of action now existing in favor of, or against, said Alturas or Logan County, may be maintained in favor of, or against, Blaine County."

Idaho Session Laws 1895, p. 33.

It is contended that because Blaine must pay this claim, based on said bonded indebtedness, and because of the provision that "all rights of action now existing in favor of, or against, Alturas or Logan County, may be maintained in favor of, or against, Blaine

County," that therefore no new obligation has been created or has arisen and that Alturas County had a right, or partial right, to the defense of the statute of limitations which had been transferred to Blaine County by this provision.

As to the first phase of their conclusion, it seems to us they fail to distinguish between the obligation to pay and the debt to be paid, while the fact is there was a new obligor and a new obligation but an old indebtedness, or else a new debt into which the old idebtedness was merged.

As to the second phase of their conclusion, it seems to be based upon the idea that a debtor has a right to be sued within a certain time, instead of the fact that he has the privilege of objecting to be sued after the lapse of a certain time. The portion of the statute of limitations which is here pleaded relates to the remedy of the creditor and not to a right of the debtor or even to the debt itself; it may be a perfect bar to the creditor by taking away his remedy, and that is the extent of its operation.

The Court appears to have treated the period of time that had intervened between the date of the maturity of the bonds and the date of the creation of Blaine County as some kind of a right which would fall to Blaine as the successor in interest of Alturas, as if there could be a partial right arise from a partial expiration of the statutory period of limitation of an action, as though if the period be five years, the fact that three years have expired after the statute has commenced to run gives three-fifths of a right to plead the statute. As to this provision the right is either absolutely perfect or it does not exist at all; there is

no formative period. As was well said by the Supreme Court of Pennsylvania, in Graffius vs. Tottenham, 1 Watts & S., 488, "The moment of conception is the instant of birth."

The learned Judge, in his decision in this cause says:

"Blaine County simply took the place occupied by Alturas; it assumed all its burdens, was invested with all its rights."

Section 8, above quoted, expressly confines the rights of Blaine County to "rights of action *now existing* in favor of or against said Alturas or Logan County."

Vide supra.

Can it be said that the right to plead the statute against the debt here involved existed at the time that section was enacted or any portion of such right? Had the right been possesed by Alturas at the time she was abolished, then there might be force in counsel's contention.

Counsel and the learned Judge appear to have confused the idea of "tacking," as it is understood in the matter of building up title to real estate by adverse possession, with the privilege of pleading the statute of limitations as a bar to a civil action, after the right has accrued. The difference between the two kinds of prescription is clearly shown by Angell: "Prescription, therefore, is of two kinds. That is, it is either an instrument of the *acquisition* of property, or an instrument of an *exemption* only from the servitude of judicial process."

Angell on Limitations, Sec. 2.

And this distinction is clearly made and fully discussed in Wood on Limitations (2 Ed.), Sec. 1, note 1.

The Revised Statutes of Idaho relating to adverse possession of real property, make provision for "tacking" (R. S. Idaho, Secs. 4040 and 4043); but there is no such provision in the chapter relating to the commencement of "actions other than for the recovery of real property."

R. S. Idaho, Chapter III, Title II.

Code Civil Procedure, Secs. 4050 to 4063.

Whatever rights of Alturas County Blaine may have succeeded to were existing March 5th, 1895. There was not conferred upon Blaine the privilege of asserting a right which at some subsequent period of time Alturas might have possessed if her existence had continued. Counsel overlooks the restrictive words "now existing," in Section 8, above quoted. And the learned District Judge does the same, for in his decision he says, "the same actions that might have [been] maintained by or against Alturas could be by or against Blaine."

Record, p. 26.

No doubt of that, and no doubt but Blaine, independent of this provision, succeeded to all rights of Alturas.

And in this aspect of this action we would further say, in this connection, that while the statute under discussion says, "all rights of action now existing in favor of, or against, said Alturas or Logan County, may be maintained in favor of, or against, Blaine County," it does not in any manner indicate an intention on the part of the Legislature that imposed this obligation on Blaine to allow to any person who may have a right of action against Blaine County a

less time within which to bring his action than is usually allowed by the statute of limitations for bringing an action of the same character. In our view of the matter the obligation of Blaine herein either arose by "operation of law" or is a "liability created by statute," which could be barred only in four or three years, as the case might be, from March 5th, 1895.

Acknowledgments and New Promises.

Even if there had never been created any trust relation between the debtor county and the holder of these bonds; conceding that no legislative debt was created and imposed upon Blaine County by and in the act of March 5, 1895; admitting that no obligation in this regard arose by operation of law on that date, still we maintain that this action was not barred at the time it was commenced.

The earliest day at which the statute could have begun to run, in any event, was November 1, 1891, when the bonds matured.

Record, p. 40.

But we contend that subsequent to the maturing of the bonds, and both before and after the creation of Blaine County, acknowledgments and new promises by the debtor counties interrupted the running of the statute and started new statutory periods which have avoided the bar defendant invokes. And then, too, we urge that there has been repeated legislative recognition which has had the same effect. The complaint fully sets out these recognitions, acknowledgements and new promises.

Record, pp. 51, 52, 54, 56, 57, 58, 59 and 44.

The learned District Judge was fully convinced that such had been done by the Legislature. In the decision on demurrer, speaking of the Legislature in the enactment of the law creating Blaine County, he says: "It did not in terms create a new debt, but recognized the validity of the old, and that Blaine should pay it."

Record, p. 26.

It should be borne in mind that at the time of the passage of that act, March 5, 1895, the statute had not run on the debt, but the debt was then some three years and four months past due.

If the statute had been running, which we deny, then when the acknowledgment and new promise were made the statute commenced anew for another statutory period on the contract debt, if, as the learned Judge held, no legislative debt was created.

1 Wood on Lim. (2 Ed.), p. 249.

Green vs. Coos Bay W. R. Co., 23 Fed., 67-70

Taylor vs. Slaten, 12 At., 727-729.

Brown vs. French, 22 S. W., 581-582.

Counties are public quasi-corporations entirely under the control of the legislative will, subject only to constitutional restrictions.

1 Beach Pub. Corp., Sec. 8.

"A county is a part of the State, and a county debt is part of the State debt."

Hunsaker vs. Borden, 5 Cal., 288.

City and County of San Francisco vs. Jones, 20 Fed., 188.

Darling vs. Mayor, 31 N. Y., 164.

"The date of this act [legislating a debt on a district] must be taken as the time when the debt was incurred."

Massachustts, &c., Co. vs. Township, 45 Fed., 336-337.

"The power of the State to recognize and pay a claim against itself after a lapse of any period of time cannot be questioned on any constitutional ground; and the power of the Legislature over counties in reference to such matters * * is just as broad."

County of Caldwell vs. Crocket, 4 S. W., 607-612.
New Orleans vs. Clark, 95 U. S., 644.

The validity of a debt of a county may be recognized by the Legislature so as to avoid the operation of the statute of limitations, even after the debt has been barred.

County of Caldwell vs. Crocket, 4 S. W., 607-610.

The consent of Blaine County, or any active acknowledgment or recognition of the debt by it, was not necessary to make binding on it the recognition of the debt made by the Legislature.

"The obligation to pay the debts of the district was imposed upon the town by a public law, of which all persons and corporations within the commonwealth were bound to take notice, and did not require any promise or consent of the town to give it effect."

Whitney vs. Stowe, 111 Mass., 368-372.

The term "valid and legal indebtedness," found in Section 7 of the act creating Blaine County, includes the debt here in question.

Sierra County vs. Dona Ana County, 21 Pac., 83.
State vs. Hardey, 21 Pac., 601.
Delp vs. Brewing Co., 15 At., 871.
Miller vs. Beardsley, 45 N. W., 756-757.

"An action is taken out of the statute of limitations by an acknowledgment of debt, which, though general in terms, sufficiently points to the particular indebtedness."

Hardy vs. Hardy, 28 At., 897-898.
Shipley vs. Shipley, 8 At., 355.

The acknowledgment or new promise need not be made to the creditor when "the circumstances are such as to show that the debtor intended that it should be communicated to the creditor, or that it should renew the debt, and this intention may be implied from the circumstances."

1 Wood on Lim. (2 Ed.), Sec. 79, p. 244.
De Freest vs. Warner, 98 N. Y., 217.
Whitney vs. Stowe, *supra.*
Smith vs. Ryan, 66 N. Y., 352.

The law itself is the promise in writing to all.

Again, the fact that the County of Blaine, in its complaint in the case of Blaine County vs. Lincoln County, in which Blaine recovered judgment for full amount demanded, included the bonds here before the Court, in the claim upon which it sued, in that action, is such another acknowledgment as to avoid the bar of the statute.

"There is also a class where, although the acknowledgment or promise was not made directly to the cred-

itor or his agent, yet, being made for the purpose of deriving, and having derived, an advantage therefrom, it is, in effect, held that he is estopped from setting up the statute, upon the ground that he cannot be allowed to take the benefit of the acknowledgment and then repudiate its obligation. That is, where a debtor under such circumstances derives an advantage from the acknowledgment, he is treated as having intended that it should be accepted as such, and confided in by the creditor."

1 Wood on Limitations (2 Ed.), Sec. 79, p. 245.

In a Virginia case, after an elaborate review of this question, it was held that where a maker of a note, in a deposition made by him in a case to which the payee of the note was not a party, swore that the note was an outstanding obligation against him, for the purpose of getting credit for the note as to be paid to him, and upon which he did not obtain such credit, the acknowledgment was such that the creditor could avail himself of in answer to a plea of the statute, set up to defeat an action upon the note.

Duguid vs. Scholfield, 32 Gratt., 803.

The same principle was applied when notes given by an executor to the testator, but barred by the statute, were included in the schedule of the assets of the estate made by the executor.

Ross vs. Ross, 6 Hun., 80.

Also in Winchell vs. Hicks, 18 N. Y., 558-564.

And also in Stuart vs. Foster, 18 Abb. Pr., 305, wherein it was said: "The code does not define what the writing shall be; it merely requires the acknowl-

edgment or promise to be in writing, signed by the party to be charged, and, for aught I can see, it can as effectually be made in a general assignment for the benefit of creditors as in any other instrument."

And also in Reed vs. His Creditors, 1 So., 784-789, where acknowledgment was made by an insolvent's including a mortgage in his schedule, which was approved.

In so far as the requirement of the statute relative to acknowledgments being in writing signed by the party, is concerned, in this action it is sufficient to say that Blaine County could not itself either make an acknowledgment or sign a written instrument except through and by those persons who, by law, are authorized to act for it.

The county brought the suit of Blaine County vs. Lincoln County, and in the complaint included the Court House Bonded Indebtedness; the county claimed it and the Court allowed it.

Record, p. 58.

Respecting the legislative recognition of the debt and promise to pay it, we merely say that it is well settled that in all things wherein the Constitution does not prohibit it, the Legislature has full power to bind the county, and when, by a general enactment, duly passed, enrolled and signed by the executive, the Legislature has in a statute made an acknowledgment which implies a promise, it is in the very highest form of writing and is signed by the party duly authorized thereunto, and within the meaning of the law is signed by the party to be charged. It is made to the world, and particularly to the parties interested. It is in the highest form of promise and in the nature of a specialty.

We further refer specially to a series of acknowledgments implying a promise to pay, made, some by the Legislature and some by acts of the debtor counties.

1st. The acknowledgment in the Alturas division act of 1889, before referred to and quoted.

2d. The legislative acknowledgment in the act of March 3, 1891, creating Alta County, and enacting that "all indebtedness of Alturas County shall be assumed and paid by Alta County."

Idaho Sess. Laws 1890-91, p. 120.

3d. The acknowledgment and promise of payment of Alturas County after the apportionment of the debt in 1894.

Record, p. 51.

4th. The Blaine act of March 5, 1895, above referred to and quoted from.

5th. By the amendment of Section 3606 of the Revised Statutes of Idaho, above referred to and quoted.

6th. By the act apportioning "Old Alturas Debt," passed March 9, 1895, referred to and quoted from above.

7th. By the act of March 9, 1895, giving to Custer County a portion of Blaine County and apportioning this indebtedness.

Idaho Sess. Laws 1895, p. 140.

8th. By the act of March 18, 1895, creating Lincoln County and apportioning the indebtedness of Blaine County, above referred to and quoted from.

9th. By the action of Blaine County vs. Lincoln County, wherein Blaine County claimed and has recovered judgment for Lincoln's proportion of this Bonded Court House Indebtedness, above referred to.

10th. By the action in 1897 of Blaine County vs. Smith et al., Commissioners of Bingham County, wherein Blaine County obtained judgment against Bingham County for moneys on account of and to be used in the payment of the old Alturas debt, above referred to.

We submit that if one or more of these acknowledgments was made within five years prior to the time of bringing this action, and within five years after the maturity of the bonds, then if there was no trust fund, if there was no legislative debt, if no new obligation arose by operation of law, and if we concede every point made by defendant in the Court below, still such acknowledgment would set the statute running anew from its date, and the action would not be barred.

In connection both with the trust relation sustained by the defendant county and with acknowledgments and new promises, we now call the attention of the Court to various acts of the Legislature referring to the Alturas County indebtedness, wherein acknowledgments are made that imply promise of payment and wherein aid and relief are extended to the debtor county in meeting obligations which include the duty of providing for and paying this debt.

Six years after the Court House Bonded Indebtedness was incurred, Alturas County was divide. (*Vide* act dividing Alturas County, *supra.*) Section 7 of that act (Idaho Sess. Laws 1889, p. 35) provided for the apportionment of Alturas County's debts, and expressly says, regarding this particular indebtedness, "but in apportioning the debt and bonds, they shall make no apportionment of the bonds issued for the erection of the court house."

Section 8 of the act (pp. 35 and 36) provided that for the proportionate share of the debts apportioned to each of the counties territorially benefited by the act of division, such counties should issue to Alturas County warrants in payment of the amount found due from each.

And further, Section 8 provides that "the money so received [from the several counties] shall be applied only to the payment of the present indebtedness of Alturas County or the securities into which it has been funded."

Idaho Session Laws 1889, p. 36.

Thus, while the Court House Bonded Indebetedness was left entirely upon Alturas County, still no particular debts to the liquidation of which the moneys received from the several new counties should be applied were specified. The moneys were to be applied *only* to the payment of "the present indebtedness of Alturas County" generally, and such indebtedness included the Court House Bonded Indebtedness; as these funds could be applied *only* to such payment it became a trust fund. So far, then, as this particular debt was concerned, Alturas County was, by the terms of the division act, made a trustee for the receipt and proper application of at least a portion of the moneys received from the new counties, as much for the benefit of the holders of Court House Bonds as for any other creditor.

While the several new counties, by the terms of the division act, were not required to levy a special tax to meet the interest accruing upon their warrants issued to Alturas County, yet Alturas County was, under the law and by the terms of her contract, compelled to

meet annually the interest accruing upon the bonded indebtedness, including the Court House Bonded Debt, which the warrants were in part to pay. This was unjust to Alturas County. Recognizing this fact, the Legislature, on March 9, 1895, amended Section 8 of the division act of 1889, and, by the terms of the amendment, imposed upon the Boards of Commissioners of the new counties the duty of levying "a special tax upon all the taxable property of their respective counties in an amount sufficient to pay the interest on said warrants, and the County Assessor of each of said counties shall pay the amount of said tax over to the Treasurer of Alturas County each year and in time to enable said County of Alturas to meet the payments of interest on the funded debt of said county, as the same shall become due."

Idaho Session Laws 1895, p. 88.

Thereby the Legislature again so recognized the debt of old Alturas as to imply and make new promise of payment and recognized and emphasized the trust relation existing between the debtor county and its creditors. The county was again required, through its proper officer, to receive money and disburse it in the payment of the interest on the funded debt of the county for the benefit of the bondholders, of whom were the holders of the Court House Bonds.

We contend that the Court erred in sustaining the demurrer upon the ground that "the complaint does not state facts sufficient to constitute a cause of action," if the demurrer was sustained upon that ground.

We further contend that the statute of limitations could not be raised by demurrer in this action.

The amended complaint shows that prior to the ex-

piration of five years from the 1st day of November, 1891, the date when the bonds by their terms became due, Alturas and Blaine Counties both had acknowledged the indebtedness constituting the basis of this action, and that new promises had been made, thus, on the face of the complaint, avoiding the statute of limitations. (Record, pp. 51, 58, 54.) The question whether the bar of the statute had been avoided was one to be determined by evidence on the trial, if that question were raised by answer.

The statute of limitations cannot be raised by demurrer unless the fact that the action is barred appears affirmatively and conclusively on the face of the complaint.

U. S. vs. Brown, 41 Fed., 481–483.

Bank vs. Winslow, 30 Fed., 488.

Lemoine vs. Dunklin County, 38 Fed., 567–570.

The statutes of California and Idaho are substantially the same.

R. S. Idaho, Secs. 4050 to 4063, inc.

Code Civ. Proc. Cal., Secs. 335 to 348, inc.

Revised Statutes Idaho, 4174.

Code Civ. Proc. Cal., 430.

In California it is held that "a demurrer to a cause of action upon the ground that it is barred by the statute of limitations, can only be sustained when the pleading shows it clearly open to the objection. To uphold a demurrer for this cause the complaint should show, *not that the cause of action may be barred, but that it is barred.* When, from the pleading, the question is left in doubt, an answer setting up the plea should be resorted to."

Palmtag vs. Roadhouse, 34 Pac., 111-112.
Williams vs. Bergin, 47 Pac., 877.
Farris vs. Merritt, 63 Cal., 118.
Harmon vs. Page, 62 Cal., 448.
Smith vs. Richmond, 19 Cal., 477.

To the same effect we cite:

Walker vs. Fleming, 14 Pac., 470 (Kan.)
Hazard vs. Dillon, 34 Fed., 485-491 (N. Y.)
Stringer vs. Stringer, 20 S. E., 242 (Ga.)
Falley vs. Gribling, 26 N. E., 794-796 and 7 (Ind.)
Christian vs. State, 34 N. E., 825.
Swatts vs. Bowen, 40 N. E., 1057 (Ind.)
Com. vs. Gardner (civil), 30 S. W., 413 (Ky.)
Grounds vs. Sloan, 11 S. W., 898 (Tex.)
Cameron vs. Cameron, 3 So., 148.
District vs. Ind. District, 28 N. W., 449-451 (Iowa).

A general demurrer does not raise the question of the statute of limitations.

Revised Statutes of U. S., Sec. 914.
Barnes vs. Ry. Co., 54 Fed., 87-93.
Cross vs. Moffat, 17 Pac., 771.
Thomas vs. Glendenning, 44 Pac., 652-653.
Revised Statutes of Idaho, Sec. 4213, *supra*.
Code Civ. Procedure Cal., Sec. 458.
Brown vs. Martin, 25 Cal., 82.

The acknowledgments and new promises alleged in the complaint were made before the statute had run on the bonds, and vitalized the debt for another statutory period.

1 Wood on Limitations (2 Ed.), p. 249.
Green vs. Coos Bay W. R. Co., 23 Fed., 67-70.

Taylor vs. Slaten, 12 At., 727-729, and cases there cited.

Brown vs. French, 22 S. W., 581-582.

At common law the statute of limitations can only be interposed by plea, and could not be urged upon demurrer to the declaration, although apparent upon its face. In equity the rule was that, if all the facts which defendant would be required to prove to sustain his plea appeared upon the face of the complaint, the defendant might take advavtage of it by demurrer. We have substantially adopted the equitable mode of pleading.

Palmtag vs. Roadhouse, 34 Pac., 111-112.

Combs vs. Watson, 32 Oh. St., 235.

The ultimate facts (acknowledgements and new promises in the case at bar) avoiding the statute should be alleged in complaint, and they were alleged.

Record, pp. 43, 44, 51, 52, 54, 56, 57, 58, 59.

Zieverink vs. Kemper, 34 N. E., 250-251.

Sublette vs. Tinney, 9 Cal., 423-425.

Humbert vs. Trinity Church, 7 Paige, 197.

Humphrey vs. Carpenter, 39 N. W., 67.

Edwards vs. Bates County, 55 Fed., 436-438.

The allegation in the complaint as to acknowledgments and new promises need not aver that they were in writing.

Green vs. Coos Bay W. R. Co., 23 Fed., 67.

Gould's Pleading, Ch. 4, Secs. 43, 44, 45, pp. 177-179.

Lamb vs. Starr, 14 Fed. Cas., 1024 (Case No. 8021.)

McDonald vs. M. V. H. Ass'n, 51 Cal., 210-212.

Cause of Action.

Does the complaint simply state a cause of action upon such portion of the original Court House Bonded Debt as is evidenced by the bonds described in the complaint? Or does the complaint state a cause of action based upon a new promise made either by the Legislature or arising by operation of law independent of statute? The learned Judge, in sustaining the demurrer, takes the ground that this is simply an action on the bonds. (Record, p. 25.) He says: "Surely this complaint, upon its face, indicates an action upon the original bonds, and not upon a debt growing out of them created at a subsequent date."

Why, then, did the pleader not follow the direction of the Code, and as each bond is a separate and distinct contract, perfect in itself, separately state as many causes of action as there are bonds? An examination of the complaint will show that in stating the original indebtedness of Alturas County, as evidenced by the bonds, the theory of the complaint is (even as to Alturas County's debt), that the claim or cause of action is for such portion of the amount of the forty thousand dollar bonded debt as was evidenced by those certain bonds and coupons.

The theory of the complaint is, first, such facts as show that on March 5, 1895, such portion of the Court House Bonded Debt as was evidenced by these bonds was then of the "valid and legal indebtedness of Alturas County." Second, such facts as show the creation of the obligation on Blaine County to pay this old debt contracted by Alturas County, whether this creation was by legislative act, or on account of the legislative act making Blaine County the successor of Al-

turas County, by operation of law. And, third, such facts as would renew the debt and start the statute running anew from date of acknowledgments and new promises implied thereby, even if, as held by defendant, no new debt or obligation was created or arose on March 5, 1895. And, fourthly, such facts as show that the statute never began to run because of the trust, the trust fund and no money ever in the trust fund.

We respectfully submit that if the original debt was by the act March 5, 1895, or by reason of successorship, merged in the obligation of Blaine County to pay, that then the complaint is sufficient. Also that if the obligation of payment on Blaine County was of a new debt then created, then the complaint is sufficient, and also that if the present obligation of Blaine County is on account of renewal of an old debt by new promises, then the complaint is sufficient; and that whichever view is taken as to the nature of the obligation, in either case the complaint would be substantially the same, because dependent on the same facts. It is a matter of deciding by what name the facts are to be called. We set forth the old obligation and the legislative acts affecting it, and it is immaterial whether the act is called a new promise or the creation of a new debt. In either light we submit the complaint would be substantially the same.

If we call the legislative acts simply recognitions of an old debt and new promises, then our pleading is correct, as it is these acknowledgments and new promises which have kept alive the original debt.

Newlin vs. Duncan, 25 Am. Dec., 66.

S. C., 1 Harrington, 204.

We quote Section 288, Angell on Lim.: "In declaring in the case of a new promise or acknowledgment, the declaration is upon the original promise. In an action of assumpsit upon a bill of exchange to which the statute was pleaded, it was objected that the plaintiff ought to declare specially on the new promise or acknowledgment. Lord Ellenborough said: 'As to the form of declaring insisted on, it is enough to say that it has never been in use, and that it is the common practice to declare on the original contract, and if the statute be pleaded, the only question is, whether the defense given by it has been waived.' In a later case, Best, Ch. J., said: 'We have every wish to give full effect to the statute. Probably the new promise ought in strictness to be declared on specially, but the practice is inveterate the other way, and we can not get over it.' When the statute is pleaded, the plaintiff may, therefore, reply the new promise, and when the pleadings assume this shape, the original promise is apparently the cause of action; but it is the new promise alone that gives it vitality, and that, substantially, is the cause of action."

But other authorities, and, apparently with reason, qualify the rule and show the marked distinction between an acknowledgment made before and one made after the statute has run upon the original debt. Mr. Wood says: "An acknowledgment or promise made before the statute has run vitalizes the old debt for another statutory period, dating from the time of the acknowledgment or promise, while an acknowledgment made *after* the statute has run gives a new cause of action, for which the old debt is a consideration. The plaintiff may in the latter case, but not in the former, declare upon the new promise." 1 Wood on Lim. (2 Ed.), p. 249.

This plaintiff may safely invoke this rule, because here the acknowledgments were made before the original debt could have been barred.

Conclusion.

In the opinion on sustaining the demurrer, the learned Judge says: "By this last act [the act creating Lincoln County, passed March 18th, 1895] it appears that Blaine County was left, composed chiefly of the territory which had, just prior to the passage of the two last named acts, constituted Alturas County." (Record, p. 24.) And again, on p. 26, he says: "Moreover, while in name Blaine County is a new party, in these transactions, in reality it is substantially the same people and territory which composed Alturas County. It is in substance the same party by another name continuing responsible for the same debt."

All this is said as ground for sustaining a demurrer which admits the allegations of the complaint, and, too, when the Court takes judicial knowledge of the provisions of the statute.

The complaint avers that at the time Alturas County was abolished it had an area of 3,652 square miles of worthless lands, a population of 576 electors, an assessed valuation of $635,561, and a debt of over $400,000 (Record, p. 55), and that Blaine County was created with 9,520 square miles, mostly good land, a voting population of 1,800 and an assessed valuation of $2,410,688. (Record, p. 57.)

The complaint also shows (Record, p. 51), Alturas claimed "to be insolvent and unable to pay, * * and that said claim was then warranted by the facts." And, on same page, the complaint shows that on ac-

count of the weak, poor and insolvent condition of Alturas County, it went before the Legislature, showing its weakness and poverty and its debts, and asked to be abolished and its territory united to territory of Logan County to form Blaine County.

We submit that the complaint, taken as a whole, and the acts of the Legislature hereinbefore referred to, clearly show that the purpose, object and effect of the Blaine Act was to create a strong, rich county, able to bear this burden of debt. The figures above given show that Blaine is not another name for Alturas, and that Alturas in no sense composes the principal part of Blaine, but, on the other hand, but a small fraction of Blaine County.

Blaine County is as distinct, independent, and different a corporation from Alturas County as it is from any other county.

As a matter of fact, if it should be contended that Blaine County, as created and as existing when it assumed this debt, was only another name for Logan County, it would be so far as area, population and wealth is concerned about three times as near the truth, for Blaine County was created mostly of Logan County. The only great inheritance she got from Alturas County was this immense debt, the very cause of its creation.

And the complaint shows that the creation of Lincoln County still left Blaine County large, strong and rich, and by the provisions of the Lincoln act Blaine was left (so far as this debt is concerned) with greater debt paying power than ever before.

Record, pp. 53, 54 and 58.

Too long we have dwelt upon the many facts which,

as it appears to us, show that the remedy of the plaintiff has not been barred and his just claim not thus lost while he patiently waited for, and relied upon, the promises of the Legislature, expecting the debtor county to place in the *Trust Fund* funds for his claim and thus fulfill the promise of its creator and justify its right and cause of existence.

How long do public officials have to refuse to perform the functions of a public office to enable the public to base a right upon their disobedience of law? For nearly four years the officers of Alturas County refused to obey the law, refused to levy the special tax to place funds in the trust fund, and it seems to be contended that by disregard of official duty and thus delaying the execution of their trust they had created some right for Alturas County which Blaine County officers could perfect by a like wicked and criminal disobedience of law and disregard of their trust.

An argument that is so powerful as to convince a moral being that a criminal disregard of duty is a mode of establishing a legal right in favor of the wrongdoer and a mode of barring a legal remedy of the suffer from the disregard may obtain a denial of justice, but, if so, the refusal should be made with the twinge of conscience exhibited on page 32 of Record: "If this were simply a question of ethics, the demurrer would be overruled, but being one of law alone it is sustained. * * * I have heard it, but I hope it will be taken to another Court for review."

If the learned Judge in contemplating the facts of this case is so shocked as to use the above language, and express the above wish, with what complacency

he will pronounce a judgment herein agreeable with ethical principles, if on this review, which he wished for, this Honorable Court can see its way clear to the decision that in this cause positive law unites with moral precept in ordering the demurrer overruled!

Respectfully submitted,

SELDEN B. KINGSBURY,

Attorney for Plaintiff in Error.

No. 441.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

Frank C. Robertson, Plaintiff in Error,

vs.

Blaine County, Defendant in Error.

ARGUMENT OF DEFENDANT IN ERROR.

LYTTLETON PRICE,
Counsel for Defendant in Error.

HAILEY, IDAHO:
DAILY AND WEEKLY NEWS-MINER JOB PRINTING HOUSE.
1898.

FILED
MAY 2 - 1898

No. 441.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

Frank C. Robertson, Plaintiff in Error,

vs.

Blaine County, Defendant in Error.

ARGUMENT OF DEFENDANT IN ERROR.

LYTTLETON PRICE,
Counsel for Defendant in Error.

HAILEY, IDAHO:
DAILY AND WEEKLY NEWS-MINER JOB PRINTING HOUSE.
1898.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

Frank C. Robertson, Plaintiff in Error,

vs.

Blaine County, Defendant in Error.

ARGUMENT OF DEFENDANT IN ERROR.

Plaintiff brings this action to recover from defendant a sum of money alleged to be due him on certain Alturas county courthouse bonds, set up in his complaint, which fell due November 1st, 1891. The action is laid on these bonds and some unpaid interest coupons thereon, pleaded together with an Act of the Idaho Legislature of 1895, page 31, and especially sections seven and eight of it, which are as follows:

7. "All valid and legal indebtedness of Alturas * * * shall be assumed and paid by the county of Blaine."

8. " * * * all rights of action now existing in favor of or against said Alturas * * * may be maintained in favor of or against Blaine county."

The manifest intent of these sections is to substitute Blaine for Alturas, without change of existing conditions or provisions.

Plaintiff also sets up as a part of his cause of action, for the purpose of avoiding the operation of the statute of limitations, facts showing that both Alturas before its dissolution and Blaine since its creation, have failed to provide by taxation or otherwise, any funds to pay these bonds; and that there is and has been no money in the treasuries of either county which could be used to pay them, and that the treasurers of both counties have refused to pay them for want of funds.

Plaintiff also contends that the Act referred to gives him a cause of action against Blaine county, in some sense independent of the contract of the Alturas bonds, for the amount of them with accrued interest thereon, as a debt laid upon Blaine county by the Legislature.

These different contentions are directly antagonistic; for if his action is on the bonds it cannot be at the same time an action on an obligation created by the statute, and *vice versa.* Neither can it be upon both, for he claims and declares upon only one cause of action. The last paragraph in the amended complaint—before the prayer—makes it clear that he intends to charge the indebtedness "*originally created by the bonds* * * * *subsequently imposed upon the defendant county by thesaid Act.*"

It is then the "valid and legal indebtedness of Alturas," as provided in section 7, that he is suing for; an indebtedness created, not by statute at all, but by the contract of the bonds. For under the terms of the section Blaine is not re-

quired to assume or pay anything else. Besides he has no right of action against Blaine except as he gets it from the statute, which, in section 8, permits him to maintain against Blaine such rights of action as then existed against Alturas, and no other. He has, then, the same cause of action—the very same obligation—and is attempting to enforce it precisely as if he were suing Alturas, instead of its successor, Blaine.

If this is not true, then he alleges no cause of action at all, for otherwise there is no liability upon the defendant.

To this complaint Blaine county demurs on two grounds:

That it fails to state a cause of action; and that it appears therefrom that its alleged cause of action is barred by the provisions of sec. 4052, statutes of Idaho—the statute of limitations.

FIRST. ON THE GENERAL DEMURRER.

Whether this be called an action for debt, or given any name within the classifications of common law actions, *the cause of action* is the bonds and the assumption of liability by defendant for their payment according to their terms. Otherwise there is no cause of action pleaded, and plaintiff is therefore forced to the position of declaring upon it in order that he may state a cause of action at all. The general demurrer is aimed against all other positions.

Plaintiff declares "this is no suit upon contract made with defendant." He is right. It is nothing else but a suit "upon contract" *made*

with Alturas. If it is anything else then there is in it no cause of action stated, because the statute under which he has his right of action gives him no kind nor right of action except for a "valid, legal indebtedness of Alturas." And as valid, legal indebtedness of Alturas he has his action, or he has none at all. He has no action against Blaine for anything else, under the statute or otherwise. If he departs from the contract with Alturas he is lost, for there, only, is the thing which makes Blaine liable to him.

Plaintiff may call this an action "for debt," or on "a specialty," or what you will. To state a cause of action at all he must plead—and he has so pleaded—the bonds and the statute *together.* Neither, pleaded alone, would suffice him. The bonds are the indebtedness which Blaine assumed, and the statute is the right to sue.

Plaintiff concedes that the Legislature could not arbitrarily fix a debt upon Blaine county unless such debt be founded upon some obligation falling upon its citizens within the contemplation of the Idaho constitution. It is equally true that the Legislature in imposing this debt upon Blaine could only require it, as it did in terms, to assume and pay the obligation which existed by reason of Alturas county's contract. That it required it to fulfill the obligation of Alturas on this contract.

Plaintiff cites a note on page 76 of Angell on Limitations, where it is said that when a statute provides for the payment of a sum of

money but does not mention any mode of recoving it, the action "lies upon the statute." This is where the obligation is created by the statute. In this case only the right of action is given by statute. The cause of action is in existence before The cause of action is not created by the statute. The right given to sue depends for its existence upon the existence of legal indebtedness—a cause of action—theretofore owing. It expressly recognizes the obligation as one already subsisting. By section 8 he has his action to recover upon it; it, at the same time limits such right of action to pre-existing causes of action. Its purport and effect are just the same as if it had specified these bonds in terms and said: "Whereas, Alturas is indebted to plaintiff on its courthouse bonds, Blaine shall pay them; and if it fail to do so according to their terms, the holder of them may sue Blaine upon them. It said, your "right of action *now existing* * * * against said Alturas * * * county may be maintained * * * against Blaine county." What right of action? The right of action plaintiff then had against Alturas. It does not create any new action nor obligation, nor cause of action. It expressly preserves and continues those "now existing," without enlargement, and confines plaintiff's rights to such as he then and theretofore enjoyed; it also prescribes plaintiff's "mode of recovery," and limits him to it. The only right of action then existing was upon the bonds, and there can be no other now. These two sections are in perfect harmony, and construed together express the legis-

lative intent. Without section 8 plaintiff might possibly have had another remedy, but, with it, the mode of recovery, the right of action, is fixed, and limited to the mode and right prescribed.

The general demurrer, therefore, confines plaintiff to the position that his action is upon the bonds, thus leaving the field clear for the discussion of the application of the statute of limitations, undisturbed by complications which arise from the claim that plaintiff's right to recover rests upon other matters and things set up in addition to the bonds.

SECOND. AS TO THE STATUTE OF LIMITATIONS.

On the face of the bonds alone, it is clear that the statute has run. The right of action accrued upon them more than six years before this suit was commenced. In Idaho the statutory period is five years on this class. So, if the action is not barred, it is because of the legal effect of the statute pleaded or by reason of the fact that funds were not provided for the payment of the bonds.

Plaintiff falls into the error of thinking that because the statute permits him to bring this action against Blaine county, his action is "founded upon the statute." He argues entirely from that standpoint.

What has before been said here clearly shows the distinction between an action founded upon a statute *creating* a cause of action and a statute granting a right of action upon a cause

already existing, recognized, affirmed, and its payment provided for. The fallacy of the argument is in the premises assumed. In support of plaintiff he cites Bullard vs. Bell. There the action appears to have been upon a "debt created by statute." Such is not the case here. Here the statute had nothing to do with the creation of the debt. This debt rests upon a private contract entered into with one Knapp in 1883. Pursuing this false hypothesis, set up to avoid the bar of the statute, he attempts to show that this obligation against Blaine is a "specialty." He insists that this is "a legislative debt," "a new obligation on Blaine county;" he calls it "the new debt," "a specialty," and says "the debt was renewed," etc

There is little room for controversy as to what this thing is which his action must be based upon. If he has an action at all, it is not upon a new debt, nor a legislative debt, nor a new obligation, nor upon a specialty, nor a novation. It is the old debt of Alturas county. That county being dissolved, a new payor is created to discharge the obligation just as Alturas had it and left it.

Plaintiff specially urges two points in avoidance of the statute:

1st. Because, by the Acts creating Blaine county, the debt was renewed and legislated upon Blaine county; and

2nd. Because neither Alturas nor Blaine has ever levied any tax, or in any manner raised any fund applicable to the payment of the debt.

As to the first point, the facts are not with him, and a slight examination of his citations shows that they are not applicable. Bullard vs. Bell seems to have been a question as to the right to maintain an action for debt upon a duty imposed by a statute, where the statute enjoining the duty fails to prescribe a mode of enforcing it. It seems, also, to involve the question whether the statutory obligation was, in legal effect, the same as a promise to perform it. Here there is no question of that kind. We need not inquire whether an action for debt would lie directly on the statutory duty, because the statute imposing it upon us gave at the same time a right of action and limited the plaintiff's rights to that. It prescribed the plaintiff's mode of recovery and left him no other. It was ample, and in no way changed his status with respect to the obligation held by him. Neither need plaintiff hunt for a promise or a legal substitute for one. If our statute did not contain section 8 the cases might be thought similar in this particular; but in view of that section there is no possible application of this case.

The case of Van Hook vs. Whitlock is subject apparently to the same criticism. The question seems to have been whether an action for debt could be maintained upon a statutory requirement to pay money if the statute imposing the obligation is silent as to the means of enforcing the obligation. I understand the purpose of citing these cases is only to show the nature of the defendant's liability to plaintiff,

and to fix its birth. The plaintiff's right of recovery and mode of recovery being fixed, the nature of the liability need not be inquired into to determine how the plaintiff could enforce his rights. Neither need the date of birth of Blaine county's liability be fixed, for if the liability of Blaine county is upon a cause of action which had already accrued when this liability was laid upon it, as I believe I have conclusively shown, that date is not a factor in this problem, and the two cases cited need no further discussion.

The case of Underhill vs. Sonora was an action to recover on certain city bonds dated March 25th, 1853, payable two years after date. It is to be presumed they were legally issued because no point is made on the want of authority in the city to utter them. Suit was commenced April 5th, 1860. The city pleaded the statute of limitations. Plaintiff contended that the statute had been repealed as to these bonds by two special Acts of the legislature, one of March 9th, 1855, which directed the city to levy a tax of one per cent. semi-annually for three years, for the purpose of paying the debt; and if then the debt was not paid to levy a sufficient tax, in addition to the one per cent., to pay it. It appears that the debt was not then paid, and a second Act was passed March 29th, 1858, in the same words, except that six years are specified instead of three. The Court holds that this is not only a recognition of this debt, but a provision for its payment. That the levy of the tax was a public duty, and carried with it a legal obligation to discharge that duty; and that it

might have been enforced by appropriate proceedings — evidently meaning by mandamus. *That it afforded a remedy to the bondholder for the enforcement of the claim as a valid money obligation.* That as the city assented to the legislative recognition of the debt and provision for payment (and incidentally that this assent made no difference), it was equivalent to the city itself doing them as its own acts. The Court further says: "It is equivalent to a trust deed by the city, setting apart property out of which the money due was to be paid *at a given time if not sooner paid.*" The decision says further, "this is enough to withdraw the case" (not the obligation as such) "from the operation of the statute," * * * "and we cannot conceive of any principle * * * which would hold the claim to be barred by the statute merely because the creditor waited *after this* for his money." After what? Clearly after the legislative recognition and provision. As was said by the Court, the bondholder had his remedy all the time by forcing the city to levy the tax; but because he waited until the tax money was raised or the city failed to raise it as it was directed to do, and then sued within the period of the statute, his recovery was not barred. He did sue within the period of the statute, dating its running from the time when the money was to be raised, which was three years anyway (or more as might result) after March, 1853, which would bring him to March, 1856, under the first Act; and under the second Act, six years more, which would bring him to 1862. So the statute of

four years would not run until 1866. The defendant contended that the statute commenced to run at once when the bonds fell due in March, 1855; and so it would, if the city had been required to provide funds for payment by tax levy on the date the bonds fell due (and that date had not been afterwards changed and postponed) as was the case with Alturas respecting the bonds sued on here.

The fact that there was provision made for payment at a certain time is the turning point in this case, and the conclusion is based solely upon it. The time of provision for payment is the time the statute begins to run.

Of course the statute did not begin to run until that time was reached, for notwithstanding the creditor might have proceeded by mandamus to enforce payment, it was his privilege under these special Acts to wait for the city to act without being forced, if he desired, because of the extension of time made in the provisions for payment, which the creditor elected to accept and to make part of his contract. It is true that the opinion does not specifically decide that the statute would *ever* run, but from the reason given for the decision it is manifest that, while it did not run from the maturity of the bond, as contended by the city, it would run from the "given time" fixed in the provision for its payment, and but for these special Acts the plaintiff would have been cut off.

This case is in no sense a declaration of a principle, and plaintiff says he cites it to show

that the statute could not begin to run until the legislative debt was created. If it has any application to this case it means that the statute would never run in this case; because if the statute did not begin to run when the Alturas bonds fell due nothing has occurred which, within the scope and meaning of this decision, would start it. The Acts of the Legislature which created what he styles the legislative debt on Blaine, made no provision for its payment at any time, near or remote. It merely said Blaine shall assume and pay. Within the meaning of this citation, the statute would not begin to run until a fixed time had arrived. This would be never, or until some future legislation fixed it. Provision for payment of these bonds was made in the Act providing for their issuance; and the time for that payment was the date of their maturity. Alturas was directed by that Act to levy a tax for their payment, as they should fall due. I think the case cited is excellent authority in support of defendant's contention that the statute began to run on these bonds when they fell due, as the only provision for their payment ever made fixed the time for payment at that date.

Plaintiff claims that the statute has not run for the reason "that neither the old nor the new county has ever levied a tax to provide for the payment, or in any way provided for payment, etc." As will be seen, Blaine has never been required nor directed to make any levy, and that the duty of levying a tax upon Alturas accrued

in 1891; and the duty was to levy enough at that time to pay the whole issue. There has been no change nor extension of the time when that duty was to be performed. This was "the given time" mentioned in the Sonora case as applied to this case. The plaintiff waited "after this;" but, in so waiting, he not only waited after the legislative provision but he waited five years after the time fixed by that provision for the performance of the duty enjoined; and did not, as did the plaintiff in the Sonora case, sue within the statutory period after the time fixed had arrived. The Sonora case nowhere shows whether the city levied or refused to levy a tax as directed, but it seems that in the estimation of the Court that would make no difference. The plaintiff could maintain his action within four years after the time of raising the fund had arrived. If there was a trust fund actually raised and in the treasury for the express purpose of paying the debt, the statute would not run; but this is upon entirely different considerations. A trustee of an express trust cannot plead the statute. It was this consideration in Freehill vs. Chamberlain. The action was not against the city of Sacramento (as this is against the county), but against its treasurer to compel him to pay out of moneys in his hands, placed there especially for that purpose; he contended that the coupons sued on were outlawed. By a subsequent Act—a statute passed five years after the Legislature authorized issuing the bonds in question—a board of trustees was cre-

ated for the city, who seem to have diverted the 55 per cent. of certain revenues appropriated into other channels, and no money came to the hands of the treasurer with which he could pay these coupons. At the time the action was was brought, however, the treasurer evidently had funds accruing from this 55 per cent., otherwise under the decision the right to sue him would not have accrued. In any event, the decision is only to this effect: That the city could not divert the funds from their legitimate use and then say that because they were not there when called for the statute had run. Here was an express trust in moneys actually reaching their hands, which, by the terms of the trust, they should have given to the treasurer for the purpose intended.

See cases cited in plaintiff's brief to this point.

The bondholder was therefore helpless because "according to the Act * * * no action could be maintained against the city on these bonds or coupons." If the city violated its duty, or the provision was insufficient, the statute could not begin to run, because not until the money was in the treasury would the bondholder have any right of action under the terms of his contract. In this case the Court further says: "By omitting to perform such duty the city could not create the defense of the statute of limitations;" and this is doubtless the point in the decision claimed by plaintiff as supporting his contention. It does not support it. It fails

because in the same connection the Court, emphasizing the point upon which the case turned, says: "Contrary view would place it in the power of a municipality in many cases to avoid all payment of its debts, because, if by concert of action each officer should omit to perform his duty, the time consumed in compelling each to perform such duty might be made to consume all the period of the statute before the fund would reach the treasury," and that is not "the law applicable to this case." There is no parallel or analogy between this and the case at bar in any particular. Because in the case cited it is evident that any proceeding commenced against any other than the city treasurer—as in mandamus against the trustees or otherwise—would not, in view of the Court, have stopped the running of the statute if it had commenced. For the Court say the whole period might be thus consumed. While in the case at bar it is clear, especially in view of this Sacramento case, that any proceeding and the only proceeding which could be brought—and this is the only one either against Alturas or Blaine which could be brought—would have stopped the running of the statute if it had been brought within five years after the bonds matured.

It is not contended here that the statute would not begin to run until funds were in the treasury to pay the bonds; but only that it did not begin to run until the obligation fell upon Blaine. The difference between the Sacramento case and this lies in the fact that in that case

the only action allowed was, not against the city, but the city treasurer; and the action would not lie against him until he had money with which to pay. It is true, the coupons were due at a fixed date, as are the bonds here; and provision was made for their payment at that date, as is the case here; but in the one case, while the money was raised as provided, it was not used as provided and never reached the destination contemplated, and the bondholder could not therefore reach it by any action allowed him; while here, at the fixed time, no fund was raised at all, when the cause of action against the county accrued. Here there was nothing further provided to be done as there was in both the Sonora and Sacramento cases, and which further provisions in those cases stopped the running of the statute.

Plaintiff further contends that the debt is in a position analagous to that imposed upon a trustee of an express trust, *by reason of its duty to levy the tax*, *etc.* His citations are not in support of this assumption, but are to the point that the statute does not run in favor of trustees of express trusts. That such is the law is not disputed. But that there is any trust or trustee or any analogy, as assumed, I deny.

Plaintiff's position on this point is inconsistent with his main view of his case. He admits that the statute was in operation and running when he commenced this action. If he is correct in this particular point, he is wrong in the other; for in this view, the statute not only

did not but never would commence to run. There could be no statute of limitations as against counties in any imaginable case. For if the county failed to comply with the law and raised no funds by taxation, the statute would not run until it did; and if it did raise the funds the statute would not run because the county would be trustee of an express trust. In either case the creditor could wait a thousand years if he chose.

In Sawyer vs. Colgan, cited, the opinion holds in effect that the statute would begin to run at the time the provision for their payment fixes. In this case the date of payment is fixed. Provision is made for payment of the bonds at that time. Like upon any debt founded upon contract, the obligee had his action for recovery *then.* The Acts dissolving Alturas and creating Blaine neither prevented the bringing of the action nor gave plaintiff any privilege of waiting, nor offered him any future provision. No new provision *was made.* No diversion of funds occurred. No new contract was erected. Blaine's duty was to pay the same sum, at the same time, in the same manner, without change of conditions or provisions.

That this was the legislative intent is clear from the fact that the direction to levy the tax for payment was not even re-enacted. It was left where it was found. It was the original contract, unchanged and unaffected in any manner. The cases cited by plaintiff serve but to illustrate the defendant's contention that the

statute runs from the maturity of the debt sued on.

Every case cited by him involves special facts of occurrence subsequent to the contract; upon which special facts, in every instance, the decision against the plea of the statute rests.

To hold that the statute has not run here is tantamount to holding that it would never run against Alturas. If a tax is *not* levied it does not run until it is. If it *is* levied it does not run as against the trust fund then raised. It would be to hold that the statute does does not run as against municipal debts at all.

The plaintiff does not claim so much, but his argument upon what he does claim, if sound, leads to this as inevitable.

All the matters set up by plaintiff, including all legislation on the subject, which he dominates "history of the indebtedness," is surplusage. Nothing was done and nothing could be done which would change the relation of Alturas to its creditors or impair the obligation of its contracts. Until Blaine was created, Alturas was all the time alive and subject to actions for the recovery of demands against it. The "history" of the debt is told in the allegation of the issuance of these bonds, and the recital of the statute allowing it.

Many citations are given showing that trust funds and trustees are excluded from the operation of the statute. With this there is no contention; but plaintiff cites no case which warrants a conclusion that any trust relation resulted

from the facts of this case. There was never any property set apart for the payment of this debt, nor was a fund ever created. Never but once was provision made for payment—the provision of a tax to pay them all when due. No apportionment ever made or attempted dealt with this debt apart from the rest; but they all dealt with the aggregate debts, particularising none. To say that a trust relation grew out of these matters and thus stopped the running of the statute is to say that the statute would not run upon any debt of Alturas whatever; for if there was such a trust it applied to every item of debt of every kind. To say this is to say that the statute could not be pleaded to any claim against Alturas at any time, however remote from its maturity. To say that because Lincoln and other counties are to make contribution to be used in the payment of the entire debt, a sacred fund is thus created for the payment of this and other items of debt, is to say that Blaine could not be heard to defend against any claim against Alturas. The facts relating to this contribution are that the counties cut off must pay Blaine certain sums to be used in payment of the whole debt generally, and not for other purposes. Blaine is not relieved from liability, but must pay, with or without contribution. Even if the contributions had been made (and they have not) Blaine is not made a trustee, but uses her own money to pay her own debts. Her liability is in no way altered by the fact that she is to be thus aided. And if the funds so to be re-

ceived *are* trust funds, the statute had run upon the demand before the fund was created at all. Does counsel pretend that these Acts requiring contribution stopped the running of the statute which began in 1891? His contention involves it. Does he also contend that Blaine shall keep this trust fund (not yet received) for the eight years and pay him now out of other moneys?

If this money is sacred for the payment of this debt, how can he get his pay until this sacred money is received? Can he get this sacred money (less than fifty per cent. of his demand) and no more? Has the statute not run on this and has run on that part of the debt for which there is to be no contribution? The proposition argues itself *ad absurdum*, and leads to the conclusion, besides, that his cause of action has not even yet accrued.

All that plaintiff says concerning delays which would accompany a mandamus proceeding commenced in 1891, apply as well to the present case. By it he also concedes that he had an action then. If he had, why has not the statute run? Mandamus would have compelled levy of a tax and payment.

In discussing the opinion of the trial Court, plaintiff says he knows of no instance in this District where provision like this was made for payment. In every instance cited by him the provision was exactly like this, by a tax directed to be laid or moneys from specified sources so applied. The Capitol building fund was realized from license taxes, specially appropriated. The

others were from State funds levied by the respective counties. It was not necessary to plaintiff's relief to mandamus the treasurer. In the instances cited the creditor could sue to recover when the debt fell due by proceeding against the proper officers. So he could here, by mandamus against the county board to levy a tax, or he could have sued the county direct for judgment (as was in fact done in four separate suits which have gone to judgment on this same issue of bonds), before the statute run.

In claiming an acknowledgment of this liability by Blaine, plaintiff is disingenuous, to say the least. Section 4078 Idaho statutes, reads: "No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this title, unless the same is contained in some writing signed by the party to be charged thereby.

Plaintiff claims that in the action against Lincoln county for the contribution mentioned, the complaint of Blaine was such an acknowledgment. The action was commenced October 18th 1895, more than a year before the statute had run upon these bonds. This defense was not available to Blaine until November 1st 1896. Judgment was rendered in that case only about a month ago; and the period of the statute expired pending the litigation. Plaintiff seeks to induce the belief that Blaine is wilfully attempting to make Lincoln pay it a sum for something upon which it disclaims liability to its creditor.

To have the benefit and deny it to its creditor. If the statute had run then, Lincoln might have pleaded the statute on these bonds and refused to contribute pro tanto; for they would not then have been an enforcible indebtedness. Although, as the contribution was rated upon the debt as it was on March 18th, 1895, this right would have been denied and probably refused. It was enforcible against Blaine when that suit was brought. The plaintiff still had his right of action unaffected by the statute. Besides it is not true that the whole claim for contribution was recovered, as plaintiff states. The recovery was more than $20,000 less than claimed. But if it were all recovered, Blaine would not thereby be precluded of its right to plead the statute if the plaintiff failed and neglected to pursue his remedy in time, Blaine not having waived the statute.

As a matter of fact, Blaine has never recovered the contribution at all nor has it ever, since the statute run, acknowledged this as an enforcible debt; nor has any one done so for it. No doubt the legislature at various times recognised the Alturas debts, but it at no time made a new promise or acknowledged a continuing contract. It only provided for the fulfillment of Alturas' promises by another as Alturas was required to fulfil them It shows no intention in any of the Acts to do anything more than to preserve to Alturas' creditors all the rights they had as against Alturas when the debts were first created.

Much good law has been cited to support an assumption that this cause of action is different from what it is. The facts, however, cannot be changed to meet the plaintiff's necessities. The debt is a debt arising on contract. The defendant assumed the obligation of the original obligor. Became the payor of the bonds. Not a trustee of funds set apart to pay, but a payor exactly as Alturas was a payor, neither more nor less. A substitute, not by novation, because a novation would extinguish, *per se*, the original debt. This debt was expressly continued as it was. The authorities cited support a theory based entirely upon false premises; and beyond those analysed above, they do not have even the appearance of application to the facts as they are. The complaint is at variance with this theory and the demurrer is to that and not to plaintiff's argument.

It is admitted that except for what plaintiff urges in his brief, the statute runs here the same as in any case, and I therefore deem it unnecessary to cite authority as to the operation of the statute. If I have succeeded in exposing the fallacy of that which is urged against defendant's plea of the statute, I have accomplished the only purpose which a brief could serve in this argument.

LYTTLETON PRICE,
For Defendant in Error.

No. 443

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WILLIAM J. BRYAN, JESSE D. CARR, WILLIAM MATTHEWS, HENRY MILLER and WM. F. HERRIN; A. N. DROWN and VANDERLYN STOW, as Executors of the Last Will of W. W. Stow, Deceased,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendants in Error.

TRANSCRIPT OF RECORD.

Error to the Circuit Court of the United States for the Northern District of California.

FILED
MAY 6 - 1898

INDEX.

	page.
Amended Answer	21
Assignment of Errors	45
Certificate (to Judgment Roll)	33
Clerk's Certificate to Transcript	48
Complaint	2
Demurrer	13
Demurrer to Amended Answer	29
Exhibit "A" (Bond of William J. Bryan as Postmaster)	7
Findings	30
Judgment	32
Opinion on Demurrer	34
Order Fixing Bond on Writ of Error	47
Order Granting Leave to File an Amended Declaration	15
Order Overruling Demurrer to Declaration	20
Order Substituting Vanderlyn Stow, A. N. Drown, and W. F. Herrin, Defendants in Place of W. W. Stow, Dec'd	16
Petition for Writ of Error	43
Stipulation as to Printing of Record	1
Writ of Error	49
Writ of Scire Facias	17

United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM J. BRYAN, et al.,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Stipulation as to Printing of Record.

It is hereby stipulated and agreed by and between counsel for the plaintiffs in error and defendant in error that the following portions of the transcript of record on appeal may be omitted by the clerk of this court in the printing thereof, viz:

The original answer, pages 23 to 28, inclusive.

Order sustaining demurrer to answer, page 32.

Bond on writ of error, pages 64 to 66, inclusive.

Motion to strike out parts of amended answer, pages 43 to 44, inclusive.

Order allowing plaintiff to amend complaint, page 31.

Summons, pages 12 to 14, inclusive.

Demurrer to answer, pages 29 and 30, inclusive.

Citations.

April 28, 1898.

JOHN T. CAREY,
Counsel for Plaintiffs in Error.
SAMUEL KNIGHT,
Counsel for Defendant in Error.

[Endorsed]: Filed April 28, 1898. F. D. Monckton, Clerk.

In the Circuit Court of the United States, Ninth Cicuit, Northern District of California.

THE UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM J. BRYAN, JESSE D. CARR, WILLIAM MATTHEWS, WILLIAM W. STOW, and HENRY MILLER, Defendants.	No. 11,791.

Complaint.

The United States of America, by Charles A. Garter, Esq., its attorney, complains of William J. Bryan, Jesse D. Carr, William Matthews, William W. Stow, and Henry Miller, the above-named defendants, and for cause of complaint alleges as follows:

For that, heretofore, said defendant William J. Bryan, as principal, and Jesse D. Carr, William Matthews, William W. Stew, and Henry Miller ,as sureties, to-wit, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and eighty-six, at the city and county of San Francisco, in the State and Northern District of California, by their certain writing obligatory duly signed by them and sealed with their seals, dated on the said fourteenth day of July, one thousand eight hundred and eighty-six, a true and correct copy whereof,

duly authenticated with the seal of the auditor's office of the Treasury Department of the said United States for the Postoffice Department, sealed thereto, and the signature of T. B. Coulter, Sixth Auditor and Auditor of the Treasury for Postoffice Department, signed thereto (the said original bond being on file in auditor's office), is now shown the Court, have acknowledged themselves to be held and firmly bound, jointly and severally, unto this United States in the just and full sum of three hundred thousand dollars, to be paid to the said plaintiff, which said writing obligatory was and is subject to a certain condition therein written, in substance to the effect following: That whereas, the said William J. Bryan was postmaster at San Francisco, State and District aforesaid, it was conditioned, among other things, that if the said William J. Bryan should faithfully discharge all the duties and trusts imposed on him, either by law or the rules or regulations of the Postoffice Department, and faithfully, once in three months, or oftener if thereto required, render accounts of his receipts and expenditures as postmaster to the Postoffice Department, in the manner and form prescribed by the Postmaster General, in his several instructions to postmasters, and should pay the balance of all moneys that should come to his hands from postage collected, postage stamps, and stamped envelopes sold, or money orders issued by him, or from any other source connected with the postal service, in the manner prescribed by the Postmaster General of the United States, for the time being, and should keep safely, without loaning, using, depositing in other banks, or exchanging for other funds than as allowed by law, all the public money collected by him, or otherwise at any time placed in his

possession and custody, till the same is ordered by the Postmaster General to be transferred or paid out; and when such orders for transfer for payment are received, should faithfully and promptly make the same as directed, and should also faithfully do and perform, as agent and depositary for the Postoffice Department, all such acts and things as might be required of him by the Postmaster General; and, moreover, should faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, postage stamps, stamped envelopes, postal cards, bills, bonds, notes, drafts, receipts, vouchers, money orders, blanks, mail keys, maps, and other property and papers which he, the postmaster, or as agent and depositary as aforesaid, should receive for the use and benefit of the said Postoffice Department, then the said obligation should be void; otherwise of force. And it was further expressly agreed and stipulated that in case the said William J. Bryan, postmaster, should, during his term of office, execute a new bond with different sureties, all the parties to the said obligation should be held and bound for all charges against the said postmaster up to the end of the quarter during which such new bond should be executed; and the acceptance of such new bond, whenever the same might be signified by the Postmaster General, should date from the last day of such quarter, as by a copy of the said writing obligatory hereto attached marked Exhibit "A," and made part of this declaration, will more fully appear.

And the said plaintiff alleges that the said William J. Bryan was postmaster at San Francisco, in the State and Northern District of California, from and including the twenty-first day of June, in the year of our Lord one thou-

sand eight hundred and eighty-six, to and including the thirtieth day of June, one thousand eight hundred and ninety.

That the said office was and is the office referred to in and for which said bond was given as hereinbefore recited.

And the said plaintiff further avers that the said William J. Bryan did not well and faithfully execute and discharge the duties and trusts imposed on him as such postmaster, either by law or the rules and regulations of the Postoffice Department, and did not once in three months or oftener, when required, faithfully or otherwise render an account of his receipts and expenditures as such postmaster to the Postoffice Department in the manner and form prescribed by the Postmaster General in his several instructions to postmasters, and did not pay the balance of all moneys that came into his hands in the manner prescribed by the Postmaster General of the United States for the time being or otherwise.

And the said plaintiff assigns as a breach of the conditions of the said writing obligatory that the said William J. Bryan ,while he was postmaster as aforesaid, did from time to time in his official capacity as such postmaster, collect and receive divers sum of money on his money-order account, for which he neglected to render his account to the Postoffice Department in the manner and form or otherwise as prescribed by law; which sums of money so received on his money-order account, and not accounted for as aforesaid on the thirtieth day of June, one thousand eight hundred and ninety, amounted to the sum of nine thousand three hundred and ninety-nine dollars and eighty-eight cents, and that the said William J. Bryan, on

the said thirtieth day of June, one thousand eight hundred and ninety, did not, nor has he at any time since, paid said sum of nine thousand three hundred and ninety-nine dollars and eighty-eight cents, or any part thereof.

That the official accounts of the said William J. Bryan, as such postmaster, under his official bond or writing obligatory, were on the thirtieth day of April, one thousand eight hundred and ninety-two, adjusted at the Treasury Department of the United States, in conformity with law and the rules and regulations of the said Department made in pursuance of law. Whereby the said sum of or balance of nine thousand three hundred and ninety-nine dollars and eighty-eight cents has been ascertained and reported to be due to the United States from said William J. Bryan, postmaster as aforesaid. By means of which said breach of said writing obligatory as hereinbefore signed and set forth an action hath accrued to the said plaintiff to have and demand of and from the said defendants, hereinbefore mentioned, the said sum of nine thousand three hundred and ninety-nine dollars and eighty-eight cents.

That the sum herein last mentioned has been demanded by plaintiff from the said defendants, but that they have utterly neglected and refused to pay the same or any part thereof.

And the said plaintiff further alleges that the said defendants are residents of the Northern District of California.

Wherefore, plaintiff became and is entitled to and so demands judgment against the said defendants for the sum of nine thousand three hundred and ninety-nine dollars and eighty-eight cents, together with lawful interest

thereon from the thirtieth day of April, one thousand eight hundred and ninety-two, and costs of suit.

(Signed) CHARLES A. GARTER,
United States Attorney.

Exhibit "A."

CERTIFICATE TO COPY OF BOND.

Chief Clerk,
Form 1026.
Exhibit "A." Office of the Auditor of the Treasury
For the Postoffice Department.

I, T. B. Coulter, Auditor of the Treasury for the Postoffice Department, do hereby certify the annexed to be a true and correct copy of the original bond, dated July 14, 1886, of William J. Bryan, late postmaster at San Francisco, in the State of California, pertaining to his accounts in the office of the Sixth Auditor of the Treasury.

In testimony whereof, I have hereunto signed my name, and caused to be affixed my seal of office, at the city of Washington, this twelfth day of April, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal] T. B. COULTER,
Sixth Auditor and Auditor of the Treasury for the Postoffice Department.

Presidential Confirmation.
(No, 1116, Series of July, 1883.)

Read the Directions before Signing.

Insert the names of the sureties in full in the body of the bond, and place of residence; also the date. The signatures to the bond should be witnessed, and the certifi-

cate on the inside should be signed by a justice of the peace, adding his official title, or if signed by a notary public, mayor, or judge, he should affix his seal. Correct the name of the postmaster if wrongly written. His first name should be signed in full.

Know All Men by These Presents, That we, William J. Bryan, of San Francisco, in the county of San Francisco, State of California, and Jesse D. Carr, of Salinas, Monterey county, State of California, and William Matthews, William W. Stow, and Henry Miller, of the city and county of San Francisco, State of California, are held and firmly bound unto the United States of America in the just and full sum of three hundred ($300,000) thousand dollars; for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

In witness whereof, we have hereunto subscribed our names and affixed our seals this fourteenth day of July, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas, the above-bounden William J. Bryan was appointed postmaster at San Francisco, as aforesaid, on the 21 day of June, 1886, by and with the advice and consent of the Senate of the United States.

Now, the condition of this obligation is such, that if the said William J. Bryan shall faithfully discharge all the duties and trusts imposed on him either by law or the rules and regulations of the Postoffice Department and faithfully, once in three months, or oftener if thereto required, render accounts of his receipts and expenditures,

as postmaster, to the Postoffice Department, in the manner and form prescribed by the Postmaster General, and shall pay the balance of all moneys that shall come into his hands, from postage collected, postage stamps, and stamped envelopes sold, or money orders issued by him, of from any other source connected with the postal service, in the manner prescribed by the Postmaster General for the time being, and shall keep safely, without loaning, using, depositing in other banks or exchanging for other funds than as allowed by law, all the public money collected by him, or otherwise at any time placed in his possession and custody, till the same is ordered by the Postmaster General to be transferred or paid out; and when such orders for transfer or payment are received, shall faithfully and promptly make the same as directed; and shall also faithfully do and perform all of the duties and obligations imposed upon or required of him by law or the rules and regulations of the Department, in connection with the money-order business; and shall also faithfully do and perform, as agent and depositary, for the Postoffice Department, all such acts and things as may be required of him by the Postmaster General; and moreover, shall faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, postage stamps, stamped envelopes, postal cards, bills, bonds, notes, drafts, receipts vouchers, money orders, blanks, mail keys, maps, and other property and papers which he, as postmaster, or as agent and depositary as aforesaid, shall receive for the use and benefit of the said Postoffice Department, then the above obligations shall be void; otherwise, of force. And it is hereby expressly agreed and stipulated that in case the

said William J. Bryan, postmaster, shall, during his term of office, execute a new bond with different sureties, all the parties to the above obligation shall be held and bound for all charges against the said postmaster up to the end of the quarter during which such new bond shall be executed; and the acceptance of such new bond, whenever the same may be signified by the Postmaster General, shall date from the last day of such quarter.

Witness to the Signatures:

Firmin Nippert. Holland Smith.	P. M. WILLIAM J. BRYAN.	[Seal]
Firmin Nippert. Holland Smith.	JESSE D. CARR.	[Seal]
Firmin Nippert. Holland Smith	WILLIAM MATTHEWS.	[Seal]
James P. Langhorne. Holland Smith.	WILLIAM W. STOW.	[Seal]
Firmin Nippert. Holland Smith.	HENRY MILLER.	[Seal]

City and County of San Francisco, }
State of California. } ss.

I hereby certify that Jesse D. Carr, of Salinas, Monterey county California, and William Matthews, William W. Stow, and Henry Miller, the sureties above-named, and who have signed the foregoing bond, are responsible and sufficient to insure the payment of double the entire penalty named therein.

Witness my hand this 14 day of July, A. D. 1886.

[Seal] HOLLAND SMITH, J. P.,

Notary Public in and for the City and County of San Francisco, State of California.

State of California,
City and County of San Francisco. } ss.

Jesse D. Carr, of Salinas, Monterey county, California, and William Matthews, William W. Stow, and Henry Miller, sureties, being duly sworn, depose and say, and each for himself deposes and says, he has executed the within bond, and that his place of residence is correctly stated therein; that he is a freeholder of said State, and that he is worth the sum here set against his name, over and above all debts and liabilities existing against him, and, also, over and above whatever property the laws of the State exempt from levy or sale, the total sum thus assured amounting to six hundred ($600,000) thousand dollars.

	Figures here.
JESSE D. CARR,	$200,000
WILLIAM MATTHEWS,	100,000
WILLIAM W. STOW,	100,000
HENRY MILLER,	200,000

Subscribed and sworn before me this 14 day of July, 1886.

HOLLAND SMITH,
Notary Public in and for the City and County of San Francisco, State of California.

Postmaster's Oath.

This Oath must be Executed by the Postmaster at the Time of Execution of Bond.

I, William J. Bryan, having been appointed postmaster at the city and county of San Francisco, and State of Cali-

fornia, do solemnly swear (or affirm) that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of postoffices and post roads within the United States; and that I will honestly and truly account for and pay over any moneys belonging to the said United States which may come into my possession or control; and I also further swear (or affirm) that I will support the Constitution of the United States: So Help Me God.

WILLIAM J. BRYAN, P M.

Sworn before me, the subscriber, a notary public in and for the city and county of San Francisco, this 14th day of July, A. D. 1886; and I certify that, to the best of my knowledge and belief, the person above named is of an age at which he is competent to contract by deed under the laws of this State.

HOLLAND SMITH,

Notary Public in and for the City and County of San Francisco, State of California.

Note.—This oath must be taken before a justice of the peace, mayor, judge, notary public, clerk of a court of record competent to administer an oath, or any officer, civil or military holding a commission under the United States and if the oath is taken before an officer having an official seal, such seal should be affixed to his certificate.

Two hundred thousand dollars.

One hundred thousand dollars.

One hundred thousand dollars.

Two hundred thousand dollars.

In the Circuit Court of the United States, Ninth Circuit Northern District of California.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

WILLIAM J. BRYAN, JESSE D. CARR, WILLIAM MATTHEWS, WILLIAM W. STOW, and HENRY MILLER,
Defendants.

No. 11,791

Demurrer.

Now comes William J. Bryan, Jesse D. Carr, William Matthews, William W. Stow, and Henry Miller, defendants in the above-entitled cause, by their attorney, John T. Carey, Esq., and appear in said cause and file this, their demurrer to the complaint on file herein, and demur to said complaint upon the grounds following, to-wit:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is uncertain in this, that it cannot be ascertained therefrom whether the breach alleged is for failing to render accounts in manner and form as required by law or for failing to pay over moneys that came into defendant Bryan's hands as postmaster.

III.

That said complaint is uncertain in this, that it cannot be ascertained therefrom whether the moneys alleged to be due are for postal revenues, postage collected, postage stamps, stamped envelopes sold or for money orders issued by defendant Bryan as postmaster.

Wherefore, defendants pray that said complaint may be dismissed, that they and each of them may go hence without day, and that they may have and recover their costs in this behalf expended.

JOHN T. CAREY,
Attorney for Defendants.

United States of America, }
State and Northern District of California. } ss.

William J. Bryan, one of the defendants named in the foregoing demurrer, being duly sworn, deposes and says that the foregoing demurrer is not interposed to delay the said cause or any proceeding therein.

Subscribed and sworn to before me this 14th day of December, 1894.

I hereby certify that I am attorney for the defendants in the above-entitled action, and that in my opinion the foregoing demurrer is well founded in point of law, and proper to be filed in the said cause.

Dated this 14th day of December, 1894.

JOHN T. CAREY,
Attorney for Defendants.

[Endorsed]: Filed Dec. 14, 1894. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to-wit, the February term, A. D. 1895, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Wednesday, the 26th day of June, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

UNITED STATES,
vs.
WM. J. BRYAN et al.
No. 11,791.

Order Granting Leave to File an Amended Declaration.

Upon motion of Samuel Knight, Esq., Assistant United States Attorney, and upon suggestion of the death of W. W. Stow, one of the defendants herein, ordered that plaintiff have leave to file an amended declaration.

At a stated term, to-wit the July term, A. D. 1895, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Thursday, the 1st day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

UNITED STATES,
vs.
WM. J. BRYAN et al. } No. 11,791.

Order Substituting Vanderlyn Stow, A. N. Drown, and W. F. Herrin, Defendants, in Place of W. W. Stow, Dec'd.

Upon motion of Samuel Knight, Esq., Assistant United States Attorney, it is ordered that Vanderlyn Stow, A. N. Drown, and W. F. Herrin, executors of the last will and testament of William W. Stow, deceased be, and they hereby are, substituted as defendants herein in place and stead of said William W. Stow, deceased. And it is further ordered that a writ of scire facias issue herein, directing the said Vanderlyn Stow, A. N. Drown, and W. F. Herrin, executors as aforesaid, to appear and answer herein, within twenty days after service of said writ.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM J. BRYAN, JESSE D. CARR, WILLIAM MATTHEWS, and HENRY MILLER and VANDERLYN STOW, A. N. DROWN and W. F. HERRIN, as Executors of the Last Will and Testament of William W. Stow, Deceased, Defendants.	}

Writ of Scire Facias.

To the United States Marshal for the Northern District of California:

Whereas, it appears by the records of the court abovenamed that the United States of America commenced an action against the said William J. Bryan, Jesse D. Carr, William Matthews, Henry Miller, and William W. Stow on the 22d day of April, 1893, for the recovery of the sum of nine thousand three hundred and ninety-nine dollars and eighty-eight cents, together with lawful interest thereon from the thirtieth day of April, one thousand eight hundred and ninety-two, and costs of suit, which

said sum was claimed by said plaintiff to be due it by reason of a breach of a certain bond to the said plaintiff made and executed by said William J. Bryan, as principal, and said Jesse D. Carr, William Matthews, Henry Miller and William W. Stow, as sureties thereof; and

Whereas, it appears that since the filing of said declaration of complaint in said action, to-wit, on the 11th day of February, 1895, the said William W. Stow died, and such proceedings were thereafter duly had in the Superior Court of the city and county of San Francisco, in said State and Northern District of California, that on the 5th day of March, 1895, letters testamentary were issued to said Vanderlyn Stow, A. N. Drown, and W. F. Herrin, the executors named in the last will and testament of said deceased, who thereupon qualified as such, and ever since have been and now are the duly appointed, qualified, and acting executors as aforesaid; and

Whereas, it appears by the records of this court in said cause that on the 1st day of August, 1895, an order was duly made by the Judge of this court, substituting the said Vanderlyn Stow, A. N. Drown, and W. F. Herrin as executors as aforesaid, as parties defendant in said cause in the place and stead of said William W. Stow, deceased;

Now, therefore, you are hereby commanded to forthwith serve upon said Vanderlyn Stow, A. N. Drown, and W. F. Herrin, executors as aforesaid, this writ, commanding them to appear and answer in said cause within twenty days from and after the service of this writ; otherwise judgment will be taken and entered against them as prayed for in the complaint filed herein, and of this writ you will make speedy service and due return.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 1st day of August, A. D. 1895.

[Seal] W. J. COSTIGAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 5th day of August, 1895, and personally served the same on 7th day of November, 1895, on A. N. Drown, by delivering to and leaving with A. N. Drown, said defendant named therein, personally, at the city and county of San Francisco, in said District, a certified copy thereof.

San Francisco, November 8th, 1895.

BARRY BALDWIN,
U. S. Marshal.
By T. J. Gallagher,
Deputy.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 5th day of August, 1895, and personally served the same on the 6th day of August, 1895, on Vanderlyn Stow and W. F. Herrin, by delivering to and leaving with Vanderlyn Stow and W. F. Herrin, said defendants named there-

in, personally, at the city and county of San Francisco, in said District, a certified copy thereof.

San Francisco, August 6th, 1895.

BARRY BALDWIN,
U. S. Marshal.
By T. J. Gallagher,
Deputy.

[Endorsed]: Filed November 8th, 1895. W. J. Costigan, Clerk.

At a stated term, to-wit, the November term, A. D. 1897, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 27th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable JAMES H. BEATTY, District Judge, District of Idaho, assigned to hold and holding Circuit Court for this District.

THE UNITED STATES
vs.
WM. J. BRYAN et al.
} No. 11,791.

Order Overruling Demurrer to Declaration.

The defendant's demurrer to plaintiff's complaint herein, heretofore submitted, and having been fully considered, it is ordered that said demurrer be, and the same hereby is, overruled, with leave to the defendants to answer herein within ten days.

In the Circuit Court of the United States, Ninth Circuit Northern District of California.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
WILLIAM J. BRYAN et al.,
Defendants.

Amended Answer.

By leave of the Court first had and obtained, defendants file this amended answer, and for answer to the complaint on file herein in the above-entitled action, defendants William J. Bryan, Jesse D. Carr, William Matthews, Henry Miller, and Wm. F. Herrin, A. N. Drown and Vanderlyn Stow, executors of the last will of W. W. Stow, heretofore substituted herein as defendants in place of W. W. Stow, deceased, make the following admission and denials and averments by way of denials and defense:

I.

Defendants admit the execution and delivery of the bond attached to and marked Exhibit "A" and made a part of the complaint herein, in the manner and at the time, for the amount, for the purpose, and upon the conditions as alleged in the complaint.

II.

Defendants admit that William J. Bryan was postmaster at San Francisco, State and Northern District of California, from and including the 21st day of June, 1886, to and including the 30th day of June, 1890.

III.

Defendants admit that the said office, to-wit, postmaster of San Francisco, State and Northern District of California, was and is the office referred to in and for which said bond was given.

IV.

Defendants deny that said William J. Bryan did not well or faithfully exercise or discharge the duties or trusts imposed upon him as such postmaster, either by law or the rules or regulations of the Postoffice Department; deny that said William J. Bryan did not once in three months, or oftener when required, faithfully, or otherwise, render an account of his receipts and expenditures as such postmaster, to the Postoffice Department, in the manner and form prescribed by the Postmaster General, in his several instructions to postmasters.

Defendants deny that said William J. Bryan did not pay the balance of all moneys that came into his hands on money order account in the manner prescribed by the Postmaster General; but, on the contrary, defendants aver that said William J. Bryan well and truly and faithfully exercised and discharged all the duties and trusts imposed on him as such Postmaster either by law or the

rules and regulations of the Postoffice Department, and did faithfully render an account of his receipts and expenditures as such postmaster to the Postoffice Department, in the manner and form prescribed by the Postmaster General, in his several instructions to postmasters, and did pay to the United States all moneys that came into his hands, on his money order accounts, in the manner and form prescribed by law and the rules and regulations of the Postmaster General to postmasters.

V.

These defendants deny that William J. Bryan, while he was postmaster at San Francisco, State and Northern District of California, in breach of the conditions of said bond, or from time to time, or at all, in his official capacity as such postmaster, or at all, did collect or receive divers or any sums of money on his money order account, or at all, for which he neglected to render his accounts to the Postoffice Department, in the manner and form, or manner or form prescribed by law, or at all; but, on the contrary, defendants aver that said defendant William J. Bryan accounted for and paid over to the United States, all money received by him, on his money order account, while postmaster aforesaid, and faithfully accounted for all money orders which he, as postmaster or agent, as aforesaid, received, for the use and benefit of the said Postoffice Department.

VI.

Defendants admit that on the 3d day of June, 1890, there was due the United States, upon the money order

account at the postoffice at San Francisco, State and Northern District of California, the sum of nine thousand three hundred and ninety-nine and 88-100 (9,399.88) dollars; and defendants further admit that said William J. Bryan did not at the date last aforesaid, nor has he at any time since, paid said sum or any part thereof; but in this connection and by way of defense to this action, these defendants aver that one James S. Kennedy, during the early part of the year 1890 was, and for several years prior thereto had been, a clerk in the postoffice at San Francisco, State and Northern District of California; that he took and held such office under the Civil Service Laws of the United States and the rules and regulations adopted pursuant to said law governing the appointment, promotion, and tenure of said office, and as such clerk had charge of the money order accounts and money order funds of said postoffice.

That said James S. Kennedy, between the 5th day of January, A. D. 1890, and the 15th day of March, A. D. 1890, received, collected, embezzled, and converted to his own use, divers sums of the money order funds of said postoffice, which said sums of money so received, collected, embezzled, and converted to his own use amounted to the sum of nine thousand three hundred and ninety-nine and 88-100 (9,399.88) dollars, which said sum and money order funds are the same for which this suit is brought against defendants herein. That said Kennedy was, on the 8th day of April, 1890, indicted by the United States Grand Jury, in and for the United States District Court, for the Northern District of California, for said offense, and thereafter on the 13th day of May, A. D. 1890, was convicted of said crime. That defendant, William J.

Bryan, as postmaster aforesaid, used all the diligence and supervisory care over said clerk that a prudent, painstaking chief officer could over a subordinate officer, to protect the United States, and to secure the faithful discharge of his duties as such clerk, and had no knowledge or intimation of the misappropriation of said money order funds by said Kennedy until after said crime had been consummated; nor did said Bryan at any time receive, nor has he yet received, said money order funds or any part thereof so misappropriated, stolen, and embezzled by said Kennedy.

VI.

That said money order funds so embezzled and misappropriated by the said Kennedy was lost to the United States without the fault or negligence of defendant, William J. Bryan.

VIII.

That the business and work of the international money order desk in the postoffice at San Francisco, State of California, from the time defendant William J. Bryan assumed the duties of postmaster of said postoffice, up to the time said moneys were embezzled and misappropriated by said Kennedy had increased nearly one hundred per cent, and the clerical force was entirely inadequate to keep up the work of the money order fund department to meet the requirements of the rules and regulations of the Postoffice Department, of which fact the Postmaster General was from time to time advised, and defendant William J. Bryan, as postmaster aforesaid from time to

time within eighteen months prior to the embezzlement of said funds ,made frequent and urgent appeals to the Postmaster General for additional clerical help at said international money order desk; but to heed or grant said applications the Postoffice Department failed, neglected, and refused until after said Kennedy had discovered the means and opportunity of misappropriating money order funds handled by him without the probability of being detected. That had the department furnished or permitted the employment of an adequate clerical force to keep up the work of the international money order desk at said postoffice in the manner and form required by the Rules and Regulations of the Postoffice Department. the said Kennedy could not have stolen and embezzled said funds or any part of them without immediate detection.

IX.

That said Kennedy, under the Rules and Regulations of the Postoffice Department, was in the custody and charge of the money order funds of the international money order desk in said postoffice at the time said funds were embezzled by him as aforesaid, and never came into the hands of defendant Bryan as postmaster or otherwise.

X.

That the postoffice inspectors appointed by the Postoffice Department at Washington, pursuant to their duties in that behalf, had inspected the money order department of the postoffice at San Francisco, California, but a short time before the discovery of the embezzlement committed by Kennedy as hereinbefore alleged, but

failed to discover said embezzlement or any defalcation at his desk or in said money order department.

XI.

These defendants deny that a cause of action therefor accrued to the United States to have and demand of and from said defendant or either of them the said sum of nine thousand three hundred and ninety-nine and 88-100 (9,399.88) dollars, or any sum whatever.

Wherefore, defendants, having fully answered plaintiff's complaint herein, pray that they and each of them may go hence without day. And defendant William J. Bryan further prays the judgment of the Court that the said money order funds were embezzled and lost to the United States without his fault or negligence; and that the Court decree that he may be credited on his money order account as postmaster in the sum of nine thousand three hundred and ninety-nine and 88-100 (9,399.88) and the accrued interest thereon.

PAGE, McCUTCHEN & EELLS, and
JOHN T. CAREY,
Attorneys for Defendant.

REUBEN H. LLOYD,
Of Counsel.

State of California,
City and County of San Francisco. } ss.

Wm. J. Bryan, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing amended answer and

knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters that he believes it to be true.

WM. J. BRYAN.

Subscribed and sworn to before me this 3d day of November, 1897.

[Seal] P. J. KENNEDY,

Notary Public in and for the City and County of San Francisco, State of California.

Service of a copy of the within amended answer is hereby admitted this 3d day of November, 1897.

SAMUEL KNIGHT,

Asst. U. S. Attorney.

[Endorsed]: Filed November 3d, 1897. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
WILLIAM J. BRYAN et al.,
Defendants.

Demurrer to Amended Answer.

And now comes the plaintiff above-named and demurs to the amended answer on file herein, and for cause of such demurrer alleges:

I.

That said amended answer does not state facts sufficient to constitute a defense to the cause of action in plaintiff's complaint contained.

II.

That said amended answer does not state facts sufficient to constitute a counterclaim to the cause of action in plaintiff's complaint contained.

Wherefore, plaintiff prays that its said demurrer be sustained, and that judgment be rendered and entered in its favor for the amount set forth in the complaint, interest thereon and costs hereof.

SAMUEL KNIGHT,
Assistant U. S. Attorney.

Certificate.

I hereby certify that in my opinion, as counsel, the foregoing demurrer is well founded in point of law.

SAMUEL KNIGHT,
Assistant U. S. Attorney.

Service of the within demurrer by copy admitted this 9th day of November, 1897.

PAGE, McCUTCHEN & EELLS,
J. T. CAREY,
Attorneys for Defendants.

[Endorsed]: Filed November 9, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs
WILLIAM J. BRYAN et al.,
Defendants.
} No. 11,791.

Findings.

This cause came on to be heard on the 29th day of November, 1897, upon the demurrer of the plaintiff to the amended answer of the defendants, and was argued by

counsel for the respective parties, and submitted to the Court for consideration and decision. And the same having been fully considered, and said demurrer having been sustained, the Court now finds the issues of fact herein in favor of the plaintiff, and, as a conclusion of law therefrom, that plaintiff is entitled to a judgment herein against the defendants in accordance with the prayer of the complaint.

Let judgment be entered herein accordingly, with costs.

Dated November 30th, 1897.

W. W. MORROW,
Circuit Judge.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
WILLIAM J. BRYAN, JESSE D. CARR, WILLIAM MATTHEWS, HENRY MILLER, and WILLIAM F. HERRIN, A. N. DROWN, and VANDERLYN STOW, as Executors of the Last Will of W. W. Stow, Deceased,
Defendants.

No. 11,791.

Judgment.

In this cause the Court having sustained the demurrer of plaintiff to the amended answer of the defendants, and ordered that findings be filed and judgment entered herein in favor of the plaintiff in accordance with the prayer of its complaint herein; and the findings of the Court having been this day filed herein:

Now, therefore, by virtue of the law, and by reason of the findings aforesaid, it is considered by the court that the United States of America, plaintiff, do have and recover of and from William J. Bryan, Jesse D. Carr, Wil-

liam Matthews, and Henry Miller, and William F. Herrin, A. N. Drown, and Vanderlyn Stow, as executors of the last will of William W. Stow, deceased, defendants, the sum of twelve thousand five hundred and forty-eight and 84-100 dollars ($12,548.84), together with its costs in this behalf expended, taxed at $56.65.

Judgment entered November 30, 1897.

[Seal] SOUTHARD HOFFMAN,
Clerk.

A true copy. Attest:

SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: Filed Nov. 30, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

THE UNITED STATES OF AMERICA, vs WM. J. BRYAN et al.,	No. 11,791.

Certificate.

I Southard Hoffman, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the forego-

ing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 30th day of November, 1897.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Filed Nov. 30, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Ciruit in and for the Northern District of California.

AT LAW.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs
WILLIAM J. BRYAN et al.,
Defendants.
} No. 11,791.

Opinion on Demurrer.

Suit for the breach of certain conditions of a postmaster's bond, in failing to account and pay over to the Post-office Department the sum of $9,399.88. Answer that the money was embezzled by a clerk who held his office under Civil Service Laws. Demurrer to answer. Demurrer sustained.

H. S. FOOTE, Esq., U. S. Attorney, and SAMUEL KNIGHT, Esq., Assistant U. S. Attorney.

JOHN T. CAREY, Esq., and Messrs. PAGE, McCUTCHEN & EELLS, Attorneys for Defendants.

MORROW, Circuit Judge.—This case comes up on a demurrer to the answer filed by defendants to complaint. The suit is brought by the United States against William J. Bryan, as principal, and Jesse D. Carr, Wm. Matthews, Wm. W. Stow, and Henry Miller, as sureties, for the alleged breach, by said defendants, of the conditions of a certain writing obligatory or bond signed and executed by them on July 14, 1886, a copy of which is annexed and made a part of the complaint. It is alleged that Wm. J. Bryan was the postmaster of San Francisco, in the State and Northern District of California, from and including the 21st of June, 1886, to and including the 30th of June, 1890; that, as such postmaster, he gave, as principal, with the remaining defendants as sureties, his official bond in the sum of $300,000, for the faithful discharge of all the duties and trusts imposed upon him, either by law or the rules or regulations of the Postoffice Department, and faithfully, once in 3 months, and oftener, if thereto required, render accounts of his receipts and expenditures as postmaster to the Postoffice Department, in the manner and form prescribed by the Postmaster General, and should pay the balance of all moneys that should come to his hands from money orders issued by him and should safely keep all the public money collected by him or other wise at any time placed in his possession and custody, till the same is ordered by the Postmaster General to be transferred or paid out; and should faithfully account

with the United States, in the manner directed by the said Postmaster General, for all money orders which he as postmaster, or as agent and depositary as aforesaid, should receive for the use and benefit of the said Postoffice Department. It is further alleged that said Wm. J. Bryan did not well and faithfully execute and discharge the duties and trusts imposed on him as such postmaster, either by law or the rules and regulations of the Postoffice Department, and did not once in 3 months, or oftener when required, faithfully or otherwise render an account of his receipts and expenditures as such postmaster to the Postoffice Department in the manner and form prescribed by the Postmaster General in his several instructions to postmasters, and did not pay the balance of all moneys that came into his hands in the manner prescribed by the Postmaster General of the United States for the time being otherwise. The particular breach of the conditions of the bond alleged is that said Wm. J. Bryan, while he was postmaster as aforesaid, did from time to time, in his official capacity as such postmaster, collect and receive divers sums of money on his money-order account, for which he neglected to render his account to the Postoffice Department in the manner and form or otherwise as prescribed by law, which sums of money so received on his money-order account, and not accounted for as aforesaid on the 30th day of June, 1890, amounted to the sum of $9,399.88, no part of which sum has been paid. The answer filed to this complaint by the defendants admits the execution and delivery of the bond, for a breach of which the United States is suing; ad mits that William J. Bryan was postmaster as alleged; denies that he did not well or faithfully exercise or dis-

charge the duties or trusts imposed upon him as such postmaster in the particulars alleged in the complaint; admits, however, that on the 3d day of June, 1890, there was due the United States, upon the money-order account at the Postoffice of San Francisco. the sum of $9,-399.88, and that, at said date, or at any time since, said sum or any part thereof, has not been paid by said William J .Bryan. It is then averred, by way of defense to the action, that the said sum of $9,399.88 was collected, embezzled. and converted to his own use by James S. Kennedy, a clerk in the postoffice at San Francisco, who had taken and held said office under the Civil Service Laws of the United States and the rules and regulations adopted pursuant to said law governing the appointment, promotion, and tenure of said office; that said Kennedy was subsequently indicted by a United States Grand Jury, in the District Court of the United States for the Northern District of California, for said offense, and was thereafter convicted of said crime. It is further averred that the defendant William J. Bryan, as postmaster aforesaid, used all the diligence and supervisory care over said clerk that a prudent, painstaking chief officer could over a subordinate officer, to protect the United States, and to secure the faithful discharge of his duties as such clerk, and had no knowledge or intimation of the misappropriation of said money order funds by said Kennedy until after said crime had been consummated; nor did said Bryan at any time receive, nor has he yet received said money-order funds or any part thereof so misappropriated, stolen, and embezzled by said Kennedy. Counsel for the United States have demurred to this answer, and our attention is directed to that part of the

answer which sets up, by way of defense, that the money which the defendant Bryan failed to account for was received and embezzled by a clerk who had been appointed and held his office under the Civil Service Laws of the United States. In other words, the question to be determined is, whether this is good matter of defense to the action brought by the United States for the alleged breach of defendant Bryan's official bond. The liability of a public officer upon his official bond is governed, to a large extent, by the terms of the bond itself, and the duties imposed upon him by law. The terms of the bond sued on in this case are absolute. No exceptions are provided for. The condition of the obligation was that he should faithfully discharge all the duties and trusts imposed on him, either by law or the rules and regulations of the Postoffice Department, etc., etc. The law, rules and regulations required him to account for all the moneys received by him as postmaster. It is admitted by the answer that he did not account for the sum sued for, viz, $9,399.88, and the defense made is as above stated. Nowhere, either in the law or in the rules and regulations of the Postoffice Department, is there any provision releasing a postmaster from his liability to the Government where money-order funds, of which he had the possession, have been embezzled by a clerk who held his office as such under the Civil Service Laws of the United States. The Court certainly cannot import such an exception into the conditions of the bond. The leading case on the general subject of the liability of depositaries of public moneys on their official bonds is United States v. Prescott et al., 3 How. 578. In that case, a receiver of public moneys had given a bond conditional, among other things, that he would "well, truly, and

faithfully keep safely all the pubic moneys collected by him," etc. Suit was brought by the United States against him and the sureties upon his official bond for a breach thereof in failing to pay certain public moneys, which he had received ,as directed by the Secretary of the Treasury. As a defense to the suit, it was attempted to justify this default by setting up that the money had been stolen from him without his fault. There was a division of opinion among the Judges of the Circuit Court where the suit was instituted, and the case was certified up to the Supreme Court on this question, viz: "Does the felonious stealing, taking, and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, discharge him and his sureties, and is that a good and valid defense to an action on his official bond?" The Supreme Court held that it was not a good defense, and Mr. Justice McLean, in delivering the opinion of the Court, states very clearly and forcibly the reasons wherefor. The learned Justice said: "This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant arises out of his official bond, and principles which are founded upon public policy. . . . . The obligation to keep safely the money is absolute, without any condition, expressed or implied, and nothing but the payment of it, when required, can discharge the bond. . . . . Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condi-

tion would open the door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defense. And it is believed the instances are few, if indeed any can be found, where any relief has been given in such cases by the interposition of Congress. As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs."

The doctrine laid down in this case has been followed in the courts of the United States and in the State Courts in a large number of cases, among which may be cited the following: United States v. Morgan, 11 How. 154; United States v. Dashiel, 4 Wall. 182; United States v. Keehler, 9 Wall. 83; Bevans v. United States, 13 Wall. 56; Boyden v. United States, 13 Wall. 17; United States v. Thomas, 15 Wall. 338; District Township of Taylor v. Morton, 37 Iowa, 555; District Township of Union v. Smith, 38 Iowa, 9; 18 Am. Rep. 39; State v. Moore, 74 Mo. 413, 41 Am. Rep. 322; Jefferson County v. Lineberger, 3 Mon. 231, 35 Am. Rep. 462; Lowry v. Polk County, 51 Iowa, 50; 33 Am. Rep. 114; State Township v. Powell, 67 Mo. 935; 29 Am. Rep. 512; Ward v. School District, 10 Neb. 293; 35 Am. Rep. 477; State v. Harper, 6 Ohio St. 610; 67 Am. Dec. 363; State v. Nevin, 19 Nev. 162; 3 Am.

St. Rep. 873; State v. Houston, 78 Ala. 576, 56 Am. Rep. 59. See, also, Mechem on Public Officers, secs. 297-301, 912, where the general doctrine is well stated and all the authorities collated. It is true that in United States v. Thomas, supra, Mr. Justice Bradley, in delivering the opinion of the Court, questioned the correctness of some of the extreme views stated in some of the authorities referred to in United States v. Prescott et al. It was held that the act of a public enemy would be a good defense against a public officer and his sureties upon his official bond. In United States v. Humason, 6 Saw. 99, the Court permitted the defense that the officer who had possession of the money was on a steamship which was lost at sea, the officer drowned, and the sum of money, while being transported by said officer, without any fault or negligence of his, lost in the Pacific Ocean. The only exceptions, therefore, sanctioned by the authorities are the act of God or of a public enemy. As the present case does not come within either of the exceptions thus recognized, it is difficult to see how the defendants, though harsh it may seem to be, can escape the exacting measure of liability which the government, based upon principles of sound public policy, requires of those public officials who handle the public moneys. The rules and regulations of the Postoffice Department and various acts of Congress indicate to what strict measure of accountability postmasters are held. Section 4029, Revised Statutes, providing for the issuing of money orders, declares that "the postmaster and his sureties shall, in every case, be held accountable upon his official bond for all moneys received by him or his designated assistants or clerks in charge of stations, from the issue of

money orders, and for all moneys which may come into his or their hands, or be placed in his or their custody by reason of the transaction by them of money-order business." In the concluding portion of section 4 of the Act of March 3, 1883 (22 Stat. at Large, 528), it is provided: "That the salaries of postmasters, as fixed by law, shall be deemed and taken to be full compensation for the responsibility and risk incurred and for the personal services rendered by them as custodians of the money order and other funds of the Postoffice Department." In other words, the liability of a postmaster, upon his official bond, for the safe keeping and faithful accounting for the public moneys that come into his possession, is regarded by law as an absolute one. The mere fact, as is pleaded by way of defense in this case, that the clerk who embezzled the mony held his office under the Civil Service Laws can make no difference. No such exception is made by the bond, and the Court cannot interpret it into the law as it now stands. Though the clerk held his position under the Civil Service Laws, he was nevertheless subject to the immediate supervision of the postmaster, and the latter was none the less responsible for his acts. (See Postal Rules and Regulations, sec. 464, edition of 1887). Moreover, I am of the opinion that, based upon principles of public policy, the postmaster should be held to an absolute liability for the acts of his subordinates, whether they be under Civil Service Rules or not. A full appreciation of this absolute liability will tend to greater vigilance and scrutiny on the part of postmasters over the acts of their subordinates, and will tend to preserve the efficiency of the postal service. Any other rule would lay the door wide open for frauds which could be practiced with impunity, tothe demoralization of the service.

I am of the opinion that the demurrer to the answer should be sustained; and it is so ordered.

[Endorsed]: Filed August 23, 1897. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit Northern District of California.

THE UNITED STATES OF AMERICA, Plaintiff, vs WILLIAM J. BRYAN, JESSE D. CARR, WILLIAM MATTHEWS, HENRY MILLER, and WM. F. HERRIN, A. N. DROWN, and VANDERLYN STOW, Executors of the Last Will of W. W. Stow, Heretofore Substituted herein as Defendants in the Place and Stead of W. W. Stow, Deceased. Defendants.	No. 11,791.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above-named defendants, and each of them, by their respective attorneys, and complain that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled

cause in said United States Circuit Court, Ninth Circuit, Northern District of California, at term thereof, A.D. 1897, against said defendants, on the 30th day of November, 1897, manifest error hath happened to the great damage of said defendants.

Wherefore, said defendants, and each of them, pray for the allowance of a writ of error, and for an order fixing the amount of bond for a supersedeas in said cause, and for such other orders and process as may cause the same to be corrected by the said United States Circuit Court of Appeals for the Ninth Judicial District.

Dated this 4th day of January, A. D. 1898.

PAGE & EELLS and
JOHN T. CAREY,
Attys. for Defendants

Allowed:

WM. W. MORROW,
Judge.

[Endorsed]: Filed January 4, 1898. Southard Hoffman, Clerk. By W. B. Beaizley, Dep. Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
WILLIAM J. BRYAN, JESSE D. CARR, WILLIAM MATTHEWS, HENRY MILLER, and WM. F. HERRIN, A. N. DROWN, and VANDERLYN STOW, Executors of the Last Will of W. W. Stow, Heretofore Substituted herein as Defendants in the Place and Stead of W. W. Stow, Deceased.
Defendants.

Assignment of Errors.

Now come the above-named defendants, and each of them make, presents, and files the following assignment of errors to be annexed to the writ of error in this cause and returned therewith, upon which defendants, and each of them, as plaintiffs in error will rely in the Circuit Court of Appeals for the Ninth Circuit, for relief from the judgment rendered in said cause in the Court below.

I.

That the Court below erred in overruling the demurrer interposed by defendants and plaintiffs in error to the original complaint filed in said cause.

II.

That the Court below erred in sustaining the demurrer interposed by plaintiff and defendant in error to the original answer filed in said cause, and by holding and deciding that the facts stated in said answer filed were not sufficient to constitute a defense to the cause of action in plaintiff's complaint contained.

III.

That the Court below erred in sustaining the first ground of the demurrer interposed by plaintiff and defendant in error to the amended answer by defendants and plaintiffs in error, and by adjudging and deciding that said amended answer does not state facts sufficient to constitute a defense to the cause of action in the plaintiff's complaint contained.

IV.

That the Court below erred in sustaining the second ground of the demurrer interposed by plaintiff and defendant in error to the amended answer filed as aforesaid in said cause, and by deciding and adjudging that said amended answer does not state facts sufficient to constitute a counterclaim to the cause of action in plaintiff's complaint contained.

V.

That the Court below erred in rendering judgment against defendants in said cause upon the pleadings in

said cause, and that said judgment is contrary to law and the facts as stated in the pleadings in said cause.

Defendants and plaintiffs in error pray that the judgment of the Court below be reversed, and such directions be given that full force and efficacy may enure to defendants by reason of the defense set up in their amended answer filed in said cause.

PAGE & EELLS and
JOHN T. CAREY,
Att'ys. for Defendants and Plaintiffs in Error.

[Endorsed.] Filed January 4, 1898. Southard Hoffman, Clerk . By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
WILLIAM J. BRYAN et al.,
Defendants.
No. 11,791.

Order Fixing Bond on Writ of Error.

This cause came on for hearing upon the application of defendants and plaintiffs in error to the Court to fix the amount of the bond to be given by said defendants and plaintiffs in error, for appeal of this cause and for supersedeas, and the Court upon consideration thereof fix-

ed the amount of the bond to be given by said defendants and plaintiffs in error at the sum of twenty-six thousand dollars.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed January 4, 1898. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
WILLIAM J. BRYAN, JESSE D. CARR, WILLIAM MATTHEWS, WILLIAM W. STOW, and HENRY MILLER,
Defendants.

No. 11,791.

Clerk's Certificate to Transcript.

I, Southard Hoffman, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing sixty-six (66) written pages, numbered from 1 to 66, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and

therein entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitutes the return to the annexed writ of ror.

I, further certify that the cost of the foregoing return to writ of error is $37.20, and that said amount was paid by William J. Bryan, one of the plaintiffs in error herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 28th day of January, A. D. 1898.

[Seal] SOUTHARD HOFFMAN,

Clerk United States Circuit Court, Northern District of California.

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The United States of America. plaintiff and defendant in error, and William J. Bryan, Jesse D. Carr, William Matthews, Henry Miller, and William F. Herrin, A. N. Drown, and Vanderlynn Stow, executors of the last will of W. W. Stow, heretofore substituted herein as defendants in the place and stead of W. W. Stow, deceased, de-

fendants and plaintiffs in error, a manifest error hath happened, to the great damage of the said William J. Bryan, Jesse D. Carr, William Matthews, Henry Miller, and Wm. F. Herrin, A. N. Drown, and Vanderlyn Stow, executors of the last will of W. W. Stow, heretofore substituted herein as defendants in the place and stead of W. W. Stow, deceased, plaintiffs in error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the third day of February next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 4th day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal] SOUTHARD HOFFMAN,

Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

Allowed by:

WM. W. MORROW,

Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 4th day of January, 1898.

SAMUEL KNIGHT,
Asst. U. S. Attorney for Plaintiff.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: Filed January 4, 1898. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

[Endorsed]: No. 443. In the United States Circuit Court of Appeals for the Ninth Circuit. William J. Bryan, Jesse D. Carr, William Matthews, Henry Miller, and Wm. F. Herrin, A. N. Drown and Vanderlyn Stow, as Executors of the Last Will of W. W. Stow, Deceased, Plaintiffs in Error, v. The United States of America, De-

fendant in Error. Transcript of Record. Error to the Circuit Court of the United States for the Northern District of California.

Filed April 1st, 1898.

F. D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.

No. 443.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WM. J. BRYAN, JESSE D. CARR, WILLIAM MATTHEWS, HENRY MILLER, AND WM. F. HERRIN; A. N. DROWN, AND VANDERLYN STOW, as Executors of the Last Will of W. W. Stow, deceased,

PLAINTIFFS IN ERROR,

VS.

THE UNITED STATES OF AMERICA,

DEFENDANT IN ERROR.

Brief of Plaintiffs in Error.

JOHN T. CAREY, AND
PAGE, MCCUTCHEN & EELLS,
Attorneys for Plaintiffs in Error.

Error to Circuit Court of the United States,

Ninth Circuit, Northern District of California.

THE STAR PRESS—JAMES H. BARRY—429 MONTG'Y ST., S. F.

FILED
AUG 1 - 1898

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WM. J. BRYAN, JESSIE D. CARR, WILLIAM MATTHEWS, HENRY MILLER AND WM. F. HERRIN, A. N. DROWN, AND VANDERLYN STOW, as Executors of the Last Will of W. W. Stow.

Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendants in Error.

Brief of Plaintiffs in Error.

STATEMENT OF THE CASE.

This suit is upon the official bond of the plaintiff in error, William J. Bryan, as Postmaster at San Fran-

cisco, California, to recover a balance of $9,399.88 due on the money order sales in said office during his term of office. The following facts alleged in the complaint are admitted to be true by the amended answer:

That William J. Bryan was Postmaster at San Francisco, California, from June 21st, 1886, to June 30th, 1890. That said Bryan, as principal, and the other plaintiffs in error as sureties, executed and delivered the bond, a copy of which is attached to plaintiffs' complaint marked Exhibit "A," and made a part thereof, at the time, in the manner, for the amount, for the purpose, upon the conditions and to the effect as alleged in the complaint.

That on the 30th day of June, A. D. 1890, there was due the United States upon the money order account at the Postoffice at San Francisco, California, the sum of $9,399.88.

That said William J. Bryan did not at the date last aforesaid nor has he at any time since or at all, paid said sum or any part thereof.

That the Treasury Department, on April 30th, 1892, adjusted the accounts of said Bryan as Postmaster, and reported the said sum of $9,399.88 to be due the United States.

That said sum has been demanded of plaintiffs in error, but that they and each of them have neglected and refused to pay the same or any part thereof.

That plaintiffs in error are residents of the Northern District of California.

The following facts alleged in the complaint are specifically denied by the amended answer, to-wit:

" And the said plaintiff further avers that the said
" William J. Bryan did not well and faithfully execute
" and discharge the duties and trusts imposed on him
" as such Postmaster, either by law or the rules
" and regulations of the Postoffice Department, and
" did not once in three months or oftener, when re-
" quired, faithfully or otherwise render an account of
" his receipts and expenditures as such Postmaster to
" to the Postoffice Department in the manner and
" form prescribed by the Postmaster General in his
" several instructions to Postmasters, and did not pay
" the balance *of all moneys that came into his hands*
" in the manner prescribed by the Postmaster Gen-
" eral of the United States for the time being or
" otherwise.

" And the said plainfiff assigns as a breach of the
" conditions of the said writing obligatory that the
" said William J. Bryan, while he was Postmaster as
" aforesaid, did from time to time in his official
" capacity as such Postmaster, collect and receive
" divers sums of money on his money-order account,
" for which he neglected to render his account to the
" Postoffice Department in the manner and form or
" otherwise as prescribed by law; which sums of
" money so received on his money-order account, and
" not accounted for as aforesaid on the thirtieth day
" of June, one thousand eight hundred and ninety,

" amounted to the sum of nine thousand three hun-
" dred and ninety-nine dollars and eighty-eight cents."

The denials of the foregoing allegations are as follows:

IV.

" Defendants deny that said William J. Bryan did not well or faithfully exercise or discharge the duties or trusts imposed upon him as sush Postmaster, either by law or the rules or regulations of the Post-office Department; deny that said William J. Bryan did not once in three months, or oftener when required, faithfully, or otherwise, render an account of his receipts and expenditures as such Postmaster, to the Postoffice Department, in the manner and form prescribed by the Postmaster General, in his several instructions to Postmasters.

" Defendants deny that said William J. Bryan did *not pay the balance of all moneys* that came into his hands on money order account in the manner prescribed by the Postmaster General; but, on the contrary, defendants aver that said William J. Bryan well and truly and faithfully exercised and discharged all the duties and trusts imposed on him as such Postmaster either by law or the rules and regulations of the Postoffice Department, and did faithfully render an account of his receipts and expenditures as such Postmaster to the Postoffice Department, in the manner and form prescribed by the

Postmaster-General, in his several instructions to postmasters, and did pay to the United States *all moneys that came into his hands*, on his money order accounts, in the manner and form prescribed by law and the rules and regulations of the Postmaster General to postmasters."

V.

"These defendants deny that William J. Bryan, while he was Postmaster at San Francisco, State and Northern District of California, in breach of the conditions of said bond, or from time to time, or at all, in his official capacity as such Postmaster, or at all, did collect or receive divers or any sums of money on his money order account, or at all, for which he neglected to render his accounts to the Postoffice Department, in the manner and form, or manner or form prescribed by law, or at all ; but, on the contrary, defendants aver that said defendant William J. Bryan accounted for and paid over to the United States, all money received by him, on his money order account, while Postmaster aforesaid, and faithfully accounted for all money orders which he, as Postmaster or agent, as aforesasd, received, for the use and benefit of the said Postoffice Department.

See pages 22 and 23 of the printed Record.

By way of defense the following facts are in substance and effect set forth in the amended answer and stand undisputed:

That James S. Kennedy was a clerk in the Postoffice at San Francisco when Wm. J. Bryan took office, and continued to hold such clerkship until some time in the spring of 1890. That said Kennedy took and held said clerkship under the Civil Service laws of the United States and the rules and regulations adopted pursuant to said law governing the appointment, promotion and tenure of said office, and as such clerk had charge of the money order accounts and money order funds of said Postoffice; that said Kennedy, between the 5th day of January, 1890, and the 15th day of March, 1890, *received, collected*, embezzled and converted to his own use divers sums of the money order funds of said Postoffice, which said several sums aggregated $9,399.88 and is the same for which this suit is brought.

That said Kennedy was, on the 8th day of April, 1890, indicted by the United States Grand Jury in and for the United States District Court for the Northern District of California for said embezzlement of said funds, and thereafter on the 13th day of May, 1890, was convicted of said crime.

That William J. Bryan, as Postmaster, used all the diligence and supervisory care over said Kennedy that a prudent, painstaking chief officer could over a subordinate officer to protect the United States, and to secure the faithful discharge of his duties as such clerk, and had no knowledge or intimation of the misappropriation of said money order funds by said Ken-

nedy until after said crime had been fully consummated.

That said Bryan never at any time, nor has he yet *received*, said money order funds, or any part thereof so misappropriated, stolen and embezzled by said Kennedy, and said money order funds were lost to the United States without the fault or negligence of said Bryan.

That said Kennedy under the rules and regulations of the Postoffice Department was in the custody and charge of the money order funds of the international money order desk in said Postoffice at the time said funds were embezzled by him as aforesaid, and said funds NEVER CAME INTO THE HANDS OF DEFENDANT BRYAN AS POSTMASTER OR OTHERWISE.

By way of emphasizing the fact that plaintiff in error, Bryan, was in no manner at fault, it is alleged in substance in the amended answer, and not denied, that the business and work of the international money order desk in said Postoffice had increased nearly one hundred per cent and the clerical force was entirely inadequate to do the work and meet the requirements of the rules and regulations at the time said Kennedy embezzled said funds, and that Bryan had from time, to time, for eighteen months prior thereto, made urgent appeals to the Postmaster-General for additional clerical help, but his appeals were ignored and denied.

That had he been furnished or permitted to employ an adequate clerical force to keep up the work at the

international money order desk in manner and form required by the rules and regulations Kennedy could not have embezzled said funds or any part thereof without immediate detection.

See pages 24, 25 and 26, Record.

In this state of the pleadings defendant in error interposed a demurrer to the amended answer upon the following grounds:

That the facts therein stated were not sufficient to constitute a defense to the cause of action set forth in the complaint.

That the facts stated in the amended answer were not sufficient to constitute a counter claim to the cause of action set forth in this complaint.

The demurrer was sustained by the Court below and judgment rendered in favor of defendant in error as prayed for in the complaint.

Errors Relied Upon Are:

A. That the Court below erred in sustaining the first ground of the demurrer interposed to the amended answer, and by adjudging and deciding that said amended answer does not state facts sufficient to constitute a defense to the cause of action in the plaintiffs' complaint contained.

B. That the Court below erred in sustaining the second ground of the demurrer interposed to the amended answer, and by adjudging and deciding that

said amended answer does not state facts sufficient to constitute a counter-claim to the cause of action in plaintiffs' complaint contained.

C. That the Court below erred in giving judgment on the pleadings in said cause against plaintiffs in error, and that said judgment is contrary to the facts as stated in the pleadings and the law of the case.

ARGUMENT.

The effect of the Demurrer to the Amended Answer is the same as a motion for judgment on the pleadings.

Judgment on the pleadings ought not to have been given, because the allegations of the complaint that "*the said William J. Bryan did not well and faithfully*
"*execute and discharge the duties and trusts imposed on*
"*him as such Postmaster* * * * *and did not once*
"*in three months or oftener when required, faithfully or*
"*otherwise render an account of his receipts and expend-*
"*itures* * * * *and did not pay the balance of all*
"*moneys* THAT CAME INTO HIS HANDS" * * *

And the further allegations of the complaint assigning the breach of the conditions of the bond sued on, viz.: "That the said William J. Bryan, while
"he was Postmaster as aforesaid, did, from time to
"time, in his official capacity as such Postmaster,
"*collect and receive divers sums of money on his money*

" *order accounts for which he neglected to render his* " *accounts* * * * which sums of money so received " on his money order account and not accounted for " as aforesaid on the 30th day of June, 1890, amounted " to the sum of $9,399.88," etc. (see Complaint, Record, pages 5 and 6), are specifically denied by the answer (see pp. IV and V of the Amended Answer, pages 22 and 23 Record), and are also denied by the following averment in the amended answer: " Nor " did said Bryan at any time *receive*, nor has he yet " *received said money order funds*, or any part thereof, " so misappropriated, stolen and embezzled by said " Kennedy." (See concluding part of pp. VI of Amended Answer; Record, page 25, also pp. IX; Record, page 26.)

If there is any one or more of the material allegations of the complaint denied by the amended answer the demurrer should not have been sustained nor should judgment have been entered on the pleadings. Judgment on the pleadings cannot be rendered in favor of plaintiff when any of the material allegations of the complaint are denied.

> *Reich* vs. *Rebellion Silver Mining Co.*, Vol. 2 Pac. Rep., 703.
>
> *Miles* vs. *McCallan*, Vol. 3 Pac. Rep., 610.
>
> *Prost* vs. *More*, 40 Cal., 347.
>
> *Hicks* vs. *Lowell*, 64 Cal., 14.

If there is a denial and also new matter of defense alleged which admits the allegations of the complaint,

plaintiff cannot have judgment on the pleadings on that account.

Nudd vs. *Thompson*, 34 Cal., 46.
Bott. vs. *Vandarment*, 67 Cal., 332.
Martin vs. *Porter*, 84 Cal., 479.

Was Postmaster Bryan responsible for the malfeasance of Clerk Kennedy by reason of the obligation arising from his official position and aside from such a bond as exists in this case?

The answer is, no.

" The general rule of official obligation, as imposed " by law, is that the officer shall perform the duties " of his office honestly, faithfully and to the best of " his ability. This is the substance of all official " oaths. In ordinary cases to expect more than this " would deter upright and responsible men from tak- " ing office. This is substantially the rule by which the " common law measures the responsibility of those " whose official duties require them to have the cus- " tody of property, public or private. If in any case " a more stringent obligation is desirable, it must be " prescribed by Statute or exacted by express stipu- " lation."

United States vs. *Thomas*, 15 Wall., p. 343.

Kennedy was an officer of the United States. He held his position not by the sufferance or appointment of Bryan but under the Civil Service Law of the United States and the rules and regulations

adopted pursuant to said law governing the appointment, promotion and tenure of the office he held.

United States vs. *Hartwell,* 6 Wall., 392.

Postmaster Bryan and Clerk Kennedy were both servants of the same master and each under a personal responsibility to the Government.

Dunlap vs. *Monroe,* 7 Cranch., 242.

Kennedy was employed in the public service of the United States. He held his position pursuant to law. The tenure of his position was not dependant upon that of his superior, the Postmaster. Vacating the office of his superior and the induction into office of another Postmaster would not have affected the tenure of his place.

United States vs. *Hartwell, supra.*

Bryan, while Postmaster, had supervising control over him, nothing more.

But it is alleged and admitted to be true: That "Bryan as Postmaster used all the diligence and "supervising care over Kennedy that a prudent, "painstaking chief officer could over a subordinate "officer to protect the United States and to secure the "faithful discharge of his duties as such clerk and "had no knowledge or intimation of the misappro-"priation of said money-order funds by said Ken-"nedy until after said crime had been consummated."

Amended Answer Record, page 25.

It is further alleged that said funds were embezzled by Kennedy and lost to the United States without the fault or negligence of Bryan.

P. VII Amended Answer Record, page 25.

In speaking of the responsibility of Postmasters for the acts of their subordinate, Judge Story in his work on bailments says:

" If an action should be properly framed for the
" purpose of charging the Deputy Postmaster with the
" default of the clerks or servants in office under him,
" it seems that his liability in such an action will de-
" pend upon the question *whether he has in fact been*
" *guilty of any negligence in not properly superintending*
" *them in the discharge of their duties in his office.* For
" it has been held that a Deputy Postmaster is respon-
" sible only for the neglect of ordinary diligence in
" the duties of his office, which consists in the want
" of proper attention to his duties in person or by his
" assistants, if he has any, or in the want of that care
" which a man of common prudence would take of
" his own affairs. *He is not, therefore, responsible for*
" *any losses* occasioned by the negligence or delinquen-
" cies, or *embezzlements of his* assistants if he exercises
" a due and reasonable superintendence over their
" official conduct and he has no reason to suspect
" them guilty of any negligence or malconduct. In
" short, such assistants are not treated as strictly his

" private servants; but in some sort, *as public officers,* " *although appointed by him.*"

Story on Bailments, sec. 463, pages 428-9, 9th ed.
Schroyer vs. *Lynch*, 8 Watts, 453.

If this was the law when Postmasters appointed their assistants, how much more unreasonable to hold them responsible for assistants and clerks whose appointments or tenure of office they cannot control.

In speaking of the responsibility of Postmasters Justice Story in his work on Agency says: "They are " not responsible, *either to the Government itself*, or to " third persons, for the misfeasance, or negligence, or " omissions of duty of the sub-agents, clerks and serv- " ants so employed under them, unless, indeed, they are " guilty of ordinary negligence at least in *not selecting* " persons of suitable skill, or in not exercising a rea- " sonable superintendence and vigilance over their " acts and doings."

Story on Agency, sec. 319*a*, page 392--9th ed.

To the same purport is sections 319[6]–321, same author.

Lane vs. *Cotton*, 1 Ld. Ryan, 646.
Whitefield vs. *Le Despencer*, Comp, 754.

The conditions have changed since Justice Story wrote upon these subjects. Then Postmasters appointed their clerks and assistants. Now clerks and assistants hold their positions independently of the Postmaster, and the promotion and tenure of their

position is governed by the Civil Service law of the United States. If, as stated in the text by Justice Story, Postmasters were not responsible for the misappropriation of their clerks and assistants when they were of their own selection and appointment, how much more reason there is for holding them free from such responsibility under present conditions.

The case is now put on a footing likened unto officers in the Army and Navy.

Postmasters must take such clerks and assistants as they find in the service. They have no power of appointment or dismissal.

They must perform their duties with the aid and assistance of clerks and assistants stationed there and holding their positions by the same and equal authority with themselves.

But the rule applied to public officers in the Army and Navy is that each is liable for his own acts, but not for the misfeasance and negligence of the subordinates under them, who, indeed, are not ordinarily appointed by them, but are appointed by the Government itself.

> *Storey on Agency*, Sec. 322, page 398, 9th ed.
> *Nicholson* vs. *Mounsey*, 15 East., 384.

Attorney-General Brewster, in a case involving the liability of a Postmaster for the wrongful acts of his assistants and clerks, after reviewing the law, said: " I am of the opinion that a Postmaster is not liable " for money appropriated by his assistants, either to

" the party who placed it in the hands of the latter, or " to the Government." Ops. Attorney-General, page 526.

Assistant Attorney-General James N. Tyner, in 1892, had the same question under consideration and came to the same conclusion. In the course of his opinion to the Postoffice Department he said: "It is " a well-settled principle of law both in England and " the United States that the Postmaster-General, the " *local Postmasters* and their assistants and clerks ap- " pointed and sworn as required by law are public " officers, each of whom is responsible for his own " defaults, and *for his own defaults only, and not for* " *those of any of the others,* although selected by him " and subject to his orders (*Keenan* vs. *Southworth*, 110 " Mass., 473, 14 Am. Rep , 613; *Lane* vs. *Cotton*, I Ld. " Ryan, 646; *Whitefield* vs. *Ford Le Despencer Cowp,* " 754; *Dunlop* vs. *Muro*, 7 Cranch., U. S., 242; *Bishop* " vs. *Williamson*, 11 Me., 495), unless he has appointed " or retained unfit or improper persons * * * or " has so carelessly conducted the affairs of his office " as to furnish opportunity for such default." (United States Postal Guide, May, 1892, pages 10 and 11.)

If Postmaster Bryan was not responsible for the mal- feasance of Kennedy arising from his official position, did he and his sureties become so by the terms and express stipulations of the bond sued on?

Let us look to the bond for an answer. The condition of the bond is as follows:

" Now the condition of this obligation is such that
" if the said William J. Bryan shall faithfully dis-
" charge all the duties and trusts imposed on him
" either by law or by the rules and regulations of the
" Postoffice Department and faithfully once in three
" months, or oftener, if thereto required, render ac-
" counts of his receipts and expenditures * * *
" *and shall pay the balance of all moneys* THAT SHALL
" COME INTO HIS HANDS from postage collected * * *
" or *money-orders* issued by him * * * and shall
" also faithfully do and perform all of the duties and
" obligations imposed upon or required of him by
" law or the rules and regulations of the Department
" in connection with the money-order business *
" * * then the above obligation shall be void,
" otherwise of force."

See copy of bond Record, pages 8 and 9.

The obligation arising from the bond because of the conditions therein stipulated is two-fold—that Bryan shall faithfully discharge his official duties and that he shall pay the balance of all moneys *that shall come into his hands.*

The contention is that the phrase and " shall pay the balance of all moneys that shall come *into his hands*," etc., creates an obligation to pay *at all events*, and this condition is supported by the earlier decision of the United States Supreme Court. *But pay what? All moneys that shall come into his hands*, all moneys *received by him* from the sources named in the bond.

The bond is the measure of his responsibility or rather liability. "The condition of an official bond " is collateral to the obligation or penalty. It is not " based on a prior debt, nor is it evidence of a debt; " and the duty secured thereby does not become a debt " *until default* be made on *the part of the principal.*"

United States vs. *Thomas*, 15 Wall., 351.

Two things must occur, then, to make him liable. He must *receive moneys* and he must fail to pay—before the condition attaches.

But as we have seen Postmasters are not responsible for the negligence or malfeasance of their assistants or clerks by reason of their official position, and can only be made so by express provision of Statute or by special contract, that is, by *express stipulations in the bond.*

The contract of the surety must be strictly construed in his favor. Courts see to it that his liability is not enlarged beyond the strict letter of his undertaking. His liability is not to be extended by implication.

Testing the conditions stipulated in the bond, the terms used by these rules, where is there to be found apt or sufficient language even to rest an implication that Bryan and his sureties undertook to make good moneys received and misappropriated by his clerks and assistants, and which *never came into his* (*Bryan's*) *hands?*

In view of the fact that the law fixing his responsibility *officially* does not hold him responsible for the negligence and malfeasance of his clerks, we would expect to find plain and explicit language in the conditions of the bond, extending and enlarging his responsibility, so as to make him and his sureties liable for their negligence and malfeasance. It is not in the bond that Bryan and his sureties shall pay the balance of *all moneys that* shall come into his or *their hands.*

Kennedy was an officer of the United States, and so far as this case is concerned, under the admitted facts, had charge of the money order funds and money order accounts, and *received, collected and embezzled* the moneys sought to be recovered of these plaintiffs in error. (Amended Ans. Record, page 24.) "Nor " did said Bryan at any time receive, nor has he yet " received, said money order funds or any part " thereof." (Record, page 25.)

The sureties in the obligation sued upon became sponsors for the honesty and integrity of William J. Bryan, and obligated themselves to pay to the Government all moneys "*that shall come into his hands* which he might fail to pay."

The liability of the sureties for the acts and embezzlement of Kennedy is not found in the stipulation of the bond. It must be looked for outside of the terms of their writing obligatory. There must be found some statute then in force extending and enlarging their liability beyond the express stipulations

of the bond. Counsel for the Government cited and the Court below in its opinion quotes Section 4029 R. S. U. S., as extending the liability of plaintiffs in error under the bond sued on to account for moneys received by clerks, etc.

That section authorizes Postmasters where there are branch postoffices or stations established, to issue or cause to be issued *by any of his assistants or clerks* IN CHARGE *of branch postoffices or stations* postal money orders, payable, etc., and provides: "And the Post-" master and his sureties shall, in every case, be held " accountable upon his official bond for all moneys " received by him or his DESIGNATED *assistants* or *clerks* " *in charge of stations* from the issue of money orders " and for all moneys which may come into *his* or " THEIR hands, or be placed in *his* or THEIR custody by " reason of the transaction by them of money order " business."

It is evident that the bond sued on in this case in the form executed did not cover *assistants and clerks in charge of stations and branch postoffices*, and but for the Statute neither the Postmaster nor his sureties would have been accountable for moneys misappropriated by them.

This is the only Statute cited by counsel for the Government and is the only one I am aware of extending the conditions stipulated in the Postmaster's bonds and holding them and their sureties accountable for moneys received by *assistants* and *clerks.*

But this section only applies to *assistants* and *clerks* DESIGNATED by Postmasters and *put in charge of branch postoffices or stations.* It is evident Congress concluded that under the general form of Postmasters' bonds that Postmasters and their sureties *were not liable* for moneys received by *assistants and clerks* else why so declare by Statute?

In extending the liability, the Statute limited it to assistants or clerks *designated* by postmasters and in in charge of branch postoffices or stations.

It gave Postmasters the right to select those they should become accountable for.

It appears as a fact in this case that Kennedy was not a *clerk* or *assistant in charge* of a *branch postoffice or station*, but was a clerk in the postoffice at San Francisco, and that he was not *designated* by the Postmaster, plaintiff in error Bryan, but held his position through and by reason of the Civil Service laws and the rules and regulations governing the appointment, promotion and tenure of said clerkship. (See p. VI Amended Answer, Record, page 24.)

As if pointing the limited construction I claim should be given to the phrase "all moneys that shall come into HIS HANDS," used in the forms of Postmasters' bonds, the statute just cited treats the words "*his hands*" as meaning the hands of the person of the Postmaster—that is, moneys in his personal control—for in extending the liability under Postmasters' bonds it provides for "*all moneys which may come into*

HIS *or* THEIR *hands* or be placed in *his or* THEIR custody."

It is alleged as a fact in the amended answer, that Kennedy was in charge of the money-order accounts and money-order funds and that he embezzled the funds for which this suit was brought.

Section 4046 R. S. U. S., under which he was convicted, recognizes the personal possession of money-order funds by clerks, assistants, etc., as distinguished from the possession by the Postmaster.

The funds embezzled were in the *hands* of Kennedy and not in the *hands* of Bryan.

They were intrusted to Kennedy by the rules and regulations of the Department and the law recognized an independent trust in him.

Section 4046, *supra*, provides: "Every Postmaster, " *assistant*, *clerk*, etc., employed in or connected with " the business or operations of any money-order " office who converts to his own use * * any portion of the money-order funds shall be deemed " guilty of embezzlement * * and any failure to " pay over or produce any money-order funds IN-" TRUSTED to *such person* shall be taken as *prima facie* " evidence of embezzlement," etc.

The contract of the surety must be strictly construed in his favor. His obligation is voluntary, without any consideration moving to him, without benefit to him, entered into for the accommodation of his principal; and Courts see to it that his liabilities

thus incurred are not *enlarged beyond the strict letter of his undertaking. He has the right to stand upon the very terms of his contract.*

Anderson vs. *Bellinger*, 13 Am. St. Rep., 47.
Miller vs. *Stewart*, 22 U. S. (9 Wheat.), 701.
United States vs. *Boyd*, 40 U. S. (15 Pet.), 208.

In the case last cited the Court say: "This Court, "in *Miller* vs. *Stewart* (9 Wheat.), 702. held that the "liability of a surety is not to be extended, by impli-"cation, beyond the terms of his contract; that his "undertaking is to receive a strict interpretation, and "not to extend beyond the fair scope of its terms, and "the whole series of authorities proceeded on this "ground."

The question presented in the case of *Harrar* vs. *U. S.*, 5 Pet., 373, was whether the bond covered past dereliction, and the Court holding that it did not, said, "If the contract is intended to cover a past "dereliction, the bond should have been made retro-"spective in its language."

So we contend if the bond in suit was intended to cover delinquences of clerks, assistants, and others connected with the Postoffice over whose appointment, designation for duty, promotion or tenure of office Bryan had no control, then it should have been so nominated on the bond.

Smith vs. *U. S.*, 2 Wall., 235.

I do not contend but that the liability of Bryan and his sureties might have been so enlarged by special contract stipulated in the bond, or by statute as to cover the case at bar, but I contend it was not done.

The mere defining his duties without more cannot be regarded as enlarging, or in anyway affecting his responsibility.

U. S. vs. *Thomas*, 15 Wall., 345.

The case at bar is not that the money was stolen from Bryan, as in the cases of *United States* vs. *Prescott*, 3 Howard, 578, or *United States* vs. *Dashiels*, 4 Wall., 185, or of *United States* vs. *Keeler*, 9 Wall., 83, where the money was voluntarily paid over to a creditor of the Government without authority; or of *United States* vs. *Boyden*, 13 Wall., 17, where a receiver of public moneys was violently robbed, or *United States* vs. *Bevans*, 13 Wall., 56, where a receiver of public moneys had moneys forcibly taken from him by agents of the Confederate States, nor yet of *United States* vs. *Thomas*, 15 Wall., 337, where the public enemy seized and forcibly took the public moneys from him. In each of these cases there was no question but that the moneys had come into *the hands* of the officers, and were taken from them either by theft, robbery or by force of a public enemy.

It is true in the case at bar that the theft by Kennedy is set forth as a defense, but it presents a twofold purpose—to show that the moneys never came

into the hands of Bryan and that Kennedy was an officer of the United States, intrusted with the moneys by authority of law, and while rightfully in possession of them and before accounting to Bryan for them, appropriated them to his own use—embezzled them.

Respectfully submitted,

JOHN T. CAREY,
Attorney for Plaintiffs in Error.

No. 443.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WM. J. BRYAN, et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

SAMUEL KNIGHT,
Asst. U. S. Attorney for Defendant in Error.

Armstrong & DeGuerre, Printers, 404 Montgomery St., S. F.

FILED

No. 443.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WM. J. BRYAN, Et. Al.,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error.

The sole question presented to the Court in this case is, *Does the embezzlement of money order funds by a Postoffice clerk, appointed and acting under Civil Service rules, relieve the Postmaster, even though free from negligence himself, from responsibility and liability to the Government upon his bond, or virtute officii, for the money thus misappropriated?*

The theories upon which rest the responsibility and liability of public officers for embezzled or stolen funds

entrusted to their possession or supervision are well stated in

Mechem on Public Officers, Sections 297-301, 912.

"Section 297. Liability of Sureties for Loss of "Funds. — The liability of the principal, and consequently of his sureties, for a loss of the public funds "by the principal without intentional wrong upon his "part, is a question of great interest and importance, but "one upon which the authorities are in conflict.

"The undertaking of the principal, and of his sureties "for him, that he will faithfully perform the duties of his "office includes, either expressly or impliedly, that he "will duly pay over the public funds which come into his "hands. The question therefore arises, what loss of the "public funds can excuse him and his sureties from this "undertaking.

"And as obviously no loss can excuse them which is "based upon the officer's own negligence or default, the "question becomes narrowed to this: What loss occurring without his negligence or default will excuse "them?

"In respect of this question, four theories, at, least, "have prevailed. Thus—

"Section 298. Same subject—One view.—1. One view "is based upon the strict language of the bond. The officer having bound himself and his sureties, without "reservation or qualification, by the express terms of his "bond that he will duly deliver and pay over the public "funds which come into his hands, *this obligation 'can "'only be met or discharged by making such delivery or payment,' and that, having bound himself by his solemn agreement to do this act, he must be 'held liable for its non-perform-*

" '*ance, though it is rendered impossible by events over which he*
" '*had no control.' If the parties had desired exemption in a*
" *given contingency, it should have been 'so nominated in the*
" '*bond.'*

"Section 299. Same Subject—Second view.—2. A
" second view, somewhat analogous to the last, is based
" upon the requirements of the public policy. '*Public*
" '*policy,' says McLean, J., 'requires that every depositary of*
" '*the public money should be held to a strict accountability.'*
" *Not only that he should exercise the highest degree of vigi-*
" *lance, but that 'he should keep safely' the moneys which come*
" *to his hands.* Any relaxation of this condition would
" open door to frauds which might be practiced with
" impunity. A depositary would have nothing more to do
" than to lay his plans and arrange his proofs, so as to
" establish his loss without laches on his part. Let such
" a principle be applied to our Postmasters, Collectors of
" the Customs, receivers of public moneys, and others
" who receive more or less of the public funds, and what
" losses might not be anticipated by the public? No such
" principle has been recognized or admitted as a legal de-
" fense. And it is believed the instances are few, if in-
" deed any can be found, where any relief has been given
" in such cases by the interposition of Congress.

"As every depositary receives the office with a full
" knowledge of its responsibilities, he cannot, in case of
" loss, complain of hardship. He must stand by his bond
" and meet the hazards which he involuntarily incurs.

"Section 300. Same Subject—A Third View—3. A
" third view is based upon the assumption that, by force of
" the statutes governing the subject, the officer becomes,
" in effect, the debtor of the public. *His liability, therefore,*
" *becomes absolute, and, like other debtors, he is not relieved*

" *from liability because he is so unfortunate as to lose, though*
" *by unavoidable accident, the money with which he expected to*
" *make payment. In legal effect, he is not a mere bailee, but he*
" *loses his own money, and cannot, therefore, call upon the*
" *public to bear the loss.*

" These views all lead obviously to the enforcement of an exceedingly strict liability.

"Section 301. Same Subject.--A Fourth View—4. But
" another view, less stringent, and, in the opinion of the
" writer, more consonant with reason and justice, has also
" met with favor, *although the cases which maintain it are*
" *few.*

" By this view the officer is regarded as standing in the
" position of a bailee for hire, and bound, *virtute officii*, to
" 'exercise good faith and reasonable skill and diligence
" 'in the discharge of his trust, or, in other words, to bring
" 'to its discharge that prudence, caution and attention
" 'which careful men usually exercise in the management
" 'of their own affairs,' but 'not responsible for any loss
" 'occurring without any fault on his part.'

"*The statute may, of course, impose, or the officer may himself*
" *assume, a more onerous responsibility*, but in the contemp-
" lation of this theory, a greater liability does not result
" from the simple undertaking to faithfully discharge the
" duties of the office.

* * * * * *

" Section 912. Extent of Liability Under Statutes and
" Bonds, and Excuses for Defaults.—*But the nature and ex-*
" *tent of the liability in this respect is usually prescribed by*
" *express statutes, and bonds are required to secure the faithful*
" *performance of the duty.* In determining the extent of the
" liability, therefore, regard must be had to these instru-
" ments which declare it.

" Under some of these statutes, the money becomes,
" upon its payment to the officer, in legal effect his money,
" and he becomes a debtor to the public for the amount of
" it. In such a case it is obvious that his liability is abso-
" lute, and, like any other debtor, he must repay although
" he may have been so unfortunate as to lose and be de-
" prived of the money, without his fault."

" In most cases, however, it is made the duty of the of-
" ficer, either by the terms of the statute prescribing his
" duties, the performance of which the bond, in general
" terms, is given to secure, or by the very language of the
" bond itself, to safely keep the public funds which come
" into his hands, and to pay them over according to law.
" In a few instances it is further provided that they shall
" be deposited in a certain manner or shall be kept in
" certain safes or other receptacles provided by the pub-
" lic; in which cases the officer who complies with the re-
" quirements is relieved from liability.

" But except in such instances, *the officer's liability is,*
" *according to the great majority of the decisions, held to be*
" *fixed by the terms of the statute or the language of the bond,*
" *and he is regarded not as a mere bailee, but as one who, by the*
" *terms of his undertaking, has incurred a fixed and absolute*
" *liability to keep the money safe at all hazards.*

" Thus a county or township Treasurer or other re-
" ceiver of public moneys is not discharged from liability
" by the failure of a bank in which he had deposited the
" funds, though he was guilty of no negligence in ascer-
" taining its financial condition, and although the county
" provided no safe place for its deposit; or by being vio-
" lently robbed of it; or by its being stolen from the
" county safe, without any lack of care on his part; or by
" the destruction of the money, without his fault.

" In a few cases, however, this absolute liability has
" been denied, and the officer has been held to be excused
" by the act of God or the public enemy, or by losses oc-
" curring without fault upon his part."

The bond of plaintiff in error Bryan and his sureties provides, in part:

" That if the said William J. Bryan shall faithfully dis-
" charge all the duties and trusts imposed upon him ei-
" ther by law or the rules and regulations of the Post-
" office Department, and faithfully, once in three months,
" or oftener, if thereto required, render accounts of his re-
" ceipts and expenditures, as Postmaster, to the Post-
" office Department, in the manner and form prescribed
" by the Postmaster General, and shall pay the balance
" of all moneys that shall come into his hands, from
" * * * money orders * * * in the manner pre-
" scribed by the Postmaster General for the time being,
" and shall keep safely, without loaning, using, deposit-
" ing in other banks or exchanging for other funds than
" as allowed by law, all the public money collected by
" him, or otherwise at any time placed in his possession
" and custody, till the same is ordered by the Postmaster
" General to be transferred or paid out; and when such
" orders for transfer or payment are received, shall faith-
" fully and promptly make the same as directed; and
" shall also faithfully do and perform all of the duties
" and obligations imposed upon or required of him by law
" or the rules and regulations of the Department, in con-
" nection with the money-order business; * * * and
" moreover, shall faithfully account with the United
" States in the manner directed by the said Postmaster
" General for all moneys, * * * money-orders * * *

" which he, as Postmaster, or as agent and depositary
" as aforesaid, shall receive for the use and benefit of the
" said Postoffice Department, then the above obligation
" shall be void; otherwise, of force."

It may be here observed, in passing, that it is idle for plaintiffs in error to contend that their amended answer unequivocally denies one or more material allegations in the complaint, inasmuch as the context shows exactly the extent of such denial and the scope and significance which the pleader expected would be placed thereon. Had these denials been unqualified, issues of fact would have been presented by the pleadings which would have necessitated a trial.

What are these denials? Plaintiffs in error deny that Bryan did not execute and discharge well and faithfully the duties and trusts imposed on him as Postmaster, and did not account for and pay to the Government the balance of all moneys that came into his hands; but admit that his money-order clerk embezzled the funds, set forth in the complaint. The denials are so far qualified by the admission that issues of law, rather than of fact, are raised.

The answer was framed and worded, and plaintiffs in error were content to rest their case upon the theory that the receipt of money by an employee of the Postoffice was not a receipt by his superior officer, the Postmaster, and the embezzlement of such money by the former did not make the latter liable therefor upon his bond or otherwise; and the pleading will certainly be construed all together, and not in isolated portions.

The law reads that a Postmaster's bond, where his office is designated as a money-order office, "shall contain an additional condition for the faithful performance of all duties and obligations in connection with the money-order business."

U. S. R. S., Section 3834.

The Postal Laws and Regulations (ed. 1887), Sections 462-464, in force during Mr. Bryan's term of office, provide for allowances for clerk hire in the money-order service, and the Postmaster's responsibility for such clerks.

It is further provided, in

U. S. R. S., Section 4029, that:

" The Postmaster of every city where branch Post-
" offices or stations are established and in operation, sub-
" ject to his supervision, is authorized, under the direc-
" tion of the Postmaster General, to issue, or to cause to
" be issued, by any of his assistants or clerks in charge of
" branch Postoffices or stations, postal money-orders, pay-
" able at his own or at any other money-order office, or at
" any branch Postoffice or station of his own, or of any
" other money-order office, as the remitters thereof may
" direct; *and the Postmaster and his sureties shall, in every*
" *case, be held accountable upon his official bond for all moneys*
" *received by him or his designated assistants or clerks in*
" *charge of stations, from the issue of money orders, and for all*
" *moneys which may come into his or their hands, or be placed*
" *in his or their custody by reason of the transaction by them of*
" *money order business.*

The Act of March 3, 1883 (22 U. S. Stats. at L., 528), Section 4, enacts, in part:

" That the salaries of Postmasters, as fixed by law, " shall be deemed and taken to be full compensation for " the responsibility and risk incurred, and for the per- " sonal services rendered by them as custodians for the " money-order and other funds of the Postoffice Depart- " ment."

This law was in force when Mr. Bryan was Postmaster, and his salary covered just such a risk as he is now seeking to avoid.

The foregoing statutory law surely indicates that Congress contemplated Postmasters should be held liable for all money-order funds regularly coming either into their possession or that of their subordinates; and the bond in this case exacted for the faithful performance by Mr. Bryan of his duties as Postmaster at San Francisco, Cal., is clearly in accordance with law.

Plaintiffs in error contend, in effect, that the principal and sureties upon the bond in question cannot be held liable to the Government because:

(1) The Postmaster was guilty of no negligence;

(2) The embezzled funds did not actually and physically come into his hands; and

(3) He did not select the money-order clerk, as the latter held office under the Civil Service.

The generally accepted authorities do not consider such reasons sufficient to excuse a public officer for the culp-

able acts of his subordinates, especially in view of the bond which the law requires the officer shall give to the Government. The act of the money-order clerk was *civiliter* the Postmaster's act; nor does it matter how the former secured his position. When the Postmaster voluntarily undertook to assume the duties of his office he was presumed to know the law governing the appointment of his subordinates, and he thereby accepted and made the money-order clerk his agent in the performance of the public business relating to that particular department. He therefore cannot now be heard to say that Kennedy's position as such clerk was so far independent of his, as Postmaster, that the latter was not responsible for the former's embezzlement.

Public policy, the language of the bond, and the relations assumed between the Government and its officers dictate that only the acts of God or the public enemy shall excuse a public official entrusted with the care and handling of public funds from liability arising from loss incurred either by himself or his subordinates; and the Supreme Court of the United States, as well as the Circuit Court of this circuit, the latter, in two instances at least, have held such officers to a rigid responsibility.

Before referring to these cases it may be well to here observe that Story on Bailments, Sections 463. 620, the same author on Agency, Sections 319, seq., and the opinion of the Assistant Attorney General for the Postoffice Department, relied upon by the learned counsel for plaintiffs in error to sustain their case, are based upon

some English and scattering American decisions, and upon the case of

Dunlop vs. Munroe, 7 Cranch., 242,

all of which, as far as we are aware, purport to define the liability of a public officer at common law to *a third person* for the nonfeasance or misfeasance of an inferior officer of the same department, but not the liability of an officer for similar acts *to the Government upon his bond or under the statute.* Herein lies the distinction which these authors have failed to observe. Otherwise their opinions are irreconcilable with later authoritative decisions.

In the case of

U. S. vs. Prescott et al., 3 How., 578,

the opinions of the Judges of the Court below were opposed on this question, namely:

" Does the felonious stealing, taking and carrying away " the public moneys in the custody of a receiver of public " moneys, without any fault or negligence on his part, " discharge him and his sureties, and is that a good and " valid defense to an action on his official bond?"

The bond sued upon was practically the same as that here involved.

Said the Court, speaking through Mr. Justice McLean (pp. 587-589):

" This is not a case of bailment, and, consequently, the " law of bailment does not apply to it. The liability of " the defendant, Prescott, arises out of his official bond, " and principles which are founded upon public policy. " The conditions of the bond are, that the said Prescott

" has 'truly and faithfully executed and discharged, and
" 'shall truly and faithfully continue to execute and dis-
" 'charge, all the duties of said office' (of receiver of pub-
"lic moneys at Chicago), 'according to the laws of the
" 'United States; and moreover has well, truly and faith-
" 'fully, and shall well, truly and faithfully, keep safely
" 'without loaning or using, all the public moneys col-
" 'lected by him, or otherwise at any time placed in his
" 'possession and custody, till the same had been or
" 'should be ordered, by the proper department or officer
" 'of the Government, to be transferred or paid out; and
" 'when such orders for transfer or payment had been or
" 'should be received, had faithfully and promptly made,
" 'and would faithfully and promptly make, the same, as
" 'directed,' etc.

" The condition of the bond has been broken, as the de-
"fendant, Prescott, failed to pay over the money received
" by him, when required to do so; and the question is,
" whether he shall be exonerated from the condition of
" his bond, on the ground that the money had been stolen
" from him.

"The objection of this defense is, that it is not within
" the condition of the bond; and this would seem to be
" conclusive. *The contract was entered into on his part, and*
" *there is no allegation of failure on the part of the Govern-*
" *ment; how, then, can Prescott be discharged from his bond?*
" *He knew the extent of his obligation, when he entered into it,*
" *and he has realized the fruits of this obligation by the enjoy-*
" *ment of the office. Shall he be discharged from liability con-*
" *trary to his own express undertaking? There is no principle*
" *on which such a defense can be sustained. The obligation to*
" *keep safely the public money is absolute, without any condi-*
" *tion, express or implied; and nothing but the payment of it,*
" *when required, can discharge the bond.* * * * *

"Public policy requires that every depositary of the
" public money should be held to a strict accountability.
" Not only that he should exercise the highest degree of
" vigilance, but that 'he should keep safely' the moneys
" which come to his hands. Any relaxation of this con-
" dition would open a door to frauds, which might be
" practiced with impunity. A depositary would have
" nothing more to do than to lay his plans and arrange
" his proofs, so as to establish his loss, without laches on
" his part. Let such a principle be applied to our Post-
" masters, Collectors of the Customs, receivers of public
" moneys, and others who receive more or less of the pub-
" lic funds, and what losses might not be anticipated by
" the public! No such principle has been recognized or
" admitted as a legal defense. And it is believed the in-
" stances are few, if, indeed, any can be found, where any
" relief has been given in such cases by the interposition
" of Congress.

"*As every depositary receives the office with a full knowledge*
" *of its responsibilities, he cannot, in case of loss, complain of*
" *hardship. He must stand by his bond, and meet the hazards*
" *which he voluntarily incurs.*

" The question certified to us is answered. that the de-
" fendant, Prescott, and his sureties, are not discharged
" from the bond, by a felonious stealing of the money,
" without any fault or negligence on the part of the de-
" positary; and, consequently, that no such defense to the
" bond can be made."

See further, on the general subject of liability upon of-
ficial bonds:

Notes in Lawyer's edition to U. S. vs. Giles, 9
Cranch., 212; and to

Postmaster General vs. Early, 12 Wheat., 136.

In the case of

U. S. vs. Morgan et al., 11 How., 154,

the Government sought to enforce a pecuniary liability upon the bond of a Collector of Customs for the District of Mississippi, arising from the theft of certain canceled Treasury notes, before leaving the Collector's agent for transmission to Washington through the Postoffice Department, and the subsequent re-use of some of these notes in paying duties upon imported merchandise at the same place.

The Court, speaking through Mr. Justice Woodbury, adhered to the principles enunciated in the case just quoted, and said:

" The argument which has been pressed to exonerate " him, even from this extent of liability, rests on an erro- " neous impression that he was acting as a bailee, and " under the responsibilities of only the ordinary diligence " of a depositary as to the canceled notes, when in truth " he was acting under his commission and duties by law, " as Collector, and under the conditions of his bond. The " Collector is no more to be treated as a bailee in this case " than he would be if the notes were still considered for " all purposes as money.

" He did not receive them as a bailee, but as a collect- " ing officer. He is liable for them on his bond, and not " on any original bailment or lending.

"And if the case can be likened to any species of bail- " ment in forwarding them, by which they were lost, it is " that of a common carrier to transmit them to the Treas- " ury, and in doing which he is not exonerated by ordi-

" nary diligence, but must answer for losses by larceny
" and even robbery. (2 Salk., 919; 8 Johns., 213; Angel
" on Carriers, Sections 1, 9.)

Again, the Supreme Court, in the case of

U. S. vs. Keehler et al., 9 Wall., 83,

in holding that the acts of the Confederate Congress and order of its Postoffice Department did not excuse a Postmaster in a Southern State, during the War of the Rebellion, for parting with the possession of funds of the Federal Government then in his hands, reiterated the foregoing views, saying, through Mr. Justice Miller:

" But this Court has decided more than once that in an
" action on the official bonds of such officers the right of
" the Government does not rest on the implied contract
" of bailment, but on the express contract found in the
" bond, to pay over the funds. And on this principle it
" was held in *U. S.* vs. *Prescott*, 3 How., 578, that a plea
" which averred positively that the money was stolen
" from the officer, without any fault or negligence on his
" part, was no defense. It would be difficult to find a
" stronger case for relief from a contract to keep safely
" and pay over the public money than this. *But the Court*
" *held that the contract was one which the defendant had volun-*
" *tarily undertaken, and which he must at his own peril per-*
" *form.* This ruling was repeated in *U. S.* vs. *Dashiel*, 4
" Wall., 185; also in *U. S.* vs. *Morgan*, 11 How., 162. Such
" was the law as declared by this Court long before the
" rebellion broke out, and however hard it may be in some
" of its aspects, the Court has no option but to act on it.

" But Congress seems not to have been inattentive to

" the injustice which the rule might work in some cases,
" and has, by the Act of April 29, 1864 (13 Stat. at L., 62),
" provided for the relief of Postmasters situated like de-
" fendant, who have manfully done their duty. That Act
" provided that in all cases where loyal Postmasters have
" been robbed by Confederate forces or rebel guerrillas,
" without fault or neglect of such Postmaster, the Post-
" master General may credit them in settlement with the
" amount lost by the robbery; and if the officer had
" settled and paid the amount before the law was passed,
" it should be paid back to him. And by the Act of March
" 3, 1865, the relief is extended to losses by any armed
" force whatever, either by robbery or burning. These
" statutes recognize the rule laid down by this Court,
" and provide for such exceptions as can be brought
" within their terms. For other cases, which present pe-
" culiar claims for relief, as this may do if it shall be
" shown that the claim of Clemmens would be a just sub-
" sisting demand against the Government but for this
" payment, the parties must resort to Congress. The
" Court is not authorized to make other exceptions than
" those made by the statutes."

Where a receiver of public moneys had given a bond similar to that here in question for the faithful performance of his duties as required by law, proof that he had been robbed of the public money received by him was held no defense to a suit on such bond, in the case of

Boyden et al., vs. U. S., 13 Wall., 17.

The Court there said that his liability was to be measured by his bond; and where that binds him to pay the money a cause which renders that impossible constitutes

no defense. Said Mr. Justice Strong, in delivering the Court's opinion:

"Were a receiver of public moneys, who has given "bond for the faithful performance of his duties as re-"quired by law, a mere ordinary bailee, it might be that "he would be relieved by proof that the money had been "destroyed by fire, or stolen from him, or taken by irre-"sistible force. He would then be bound only to the ex-"ercise of ordinary care, even though a bailee for hire. "The contract of bailment implies no more, except in the "case of common carriers, and the duty of a receiver, "*virtute officii*, is to bring to the discharge of his trust "that prudence, caution and attention which careful men "usually bring to the conduct of their own affairs. He "is to pay over the money in his hands as required by "law, but he is not an insurer. *He may, however, make him-"self an insurer by express contract, and this he does when he "binds himself in a penal bond to perform the duties of his "office without exception. There is an established difference "between a duty created merely by law and one to which is "added the obligation of an express undertaking.* The law "does not compel to impossibilities; but it is a settled "rule that if performance of an express engagement be-"comes impossible by reason of anything occurring after "the contract was made, though unforeseen by the con-"tracting party, and not within his control, he will not "be excused. (Met. Cont., 213; *The Harriman*, 9 Wall., "161.) *The rule has been applied rigidly to bonds of public "officers intrusted with the care of public money. Such bonds "have almost invariably been construed as binding the obli-"gators to pay the money in their hands when required by law, "even though the money may have been lost without fault on "their part.*"

The Court then distinguishes cases supposing to hold to the contrary, and shows that where third persons are involved a different rule of liability exists than where the relation exists between the Government only and its officers.

The Court approves of the doctrine laid down in the foregoing cases from which quotations have been made, finally saying:

"Applying it to the case now in hand, it makes it clear "that the evidence offered by the defendants, tending to "prove that the receiver had been robbed of the public "money received by him, was rightly rejected as consti- "tuting no defense to the suit on the receiver's bond. It "is true that in *Prescott's* case the defense set up was that "the money had been stolen, while the defense set up "here is robbery. But that can make no difference, unless "it be held that the receiver is a mere bailee. If, as we "have seen, his liability is to be measured by his bond, "and that binds him to pay the money, *then the cause* "*which renders it impossible for him to pay is of no import-* "*ance, for he has assumed the risk of it.*"

The Supreme Court, in the case of

U. S. vs. Thomas et al., 15 Wall., 337,

somewhat limited the doctrine formerly established by it in such class of cases as to excuse a public officer and his sureties from liability upon an official bond for loss arising from the act of God, or the public enemy, without any neglect or fault of such officer. So, where the rebel authorities, during the War of the Re-

bellion, forcibly seized public moneys in the officer's hands, the Court held that there was no liability upon the bond, which was in the usual form. The Court said, speaking through Mr. Justice Bradley:

"The Acts of Congress with respect to the duties of
" collectors, receivers and depositaries of public moneys,
" it must be conceded, manifest great anxiety for the due
" and faithful discharge by these officers of their respons-
" ible duties, and for the safety and payment of the
" moneys which may come to their hands. They are ex-
" pressly required to keep safely, without loaning, using,
" depositing in banks, or exchanging for other funds than
" as specially allowed by law, all the public money col-
" lected by them, or in their possession or custody, till or-
" dered by the proper department or officer to be trans-
" ferred or paid out; and where such orders for transfer
" or payment are received, faithfully and promptly to
" make the same as directed. (9 Stat. at L., 69, Section 9.)
" To obviate all excuse for casual losses, it is provided
" that they shall be allowed, under the direction of the
" Secretary of the Treasury, all necessary additional ex-
" penses for clerks, fireproof chests or vaults, or other
" necessary expenses of safe keeping, transferring and
" disbursing said moneys (9 Stat. at L., Section 13). And
" it is expressly made embezzlement and a felony, for an
" officer charged with the safe keeping, transfer and dis-
" bursement of the public moneys, to convert them to his
" own use, or to use them in any way whatever, or to loan
" them, deposit them in bank, or to exchange them for
" other funds except as ordered by the proper department
" or officer. (9 Stat. at L., Section 16.) Every receiver of
" public money is required to render his accounts quarter-

" yearly to the proper accounting officers of the Treasury,
" with the vouchers necessary to the prompt settlement
" thereof, within three months after the expiration of
" each quarter, subject, however, to the control of the
" proper department. (3 Stat. at L., 723, Section 2.) Be-
" sides this, all such officers are required to give bonds
" with sufficient sureties for the due discharge of all these
" duties. (1 Stat. at L., 705; 2 Stat. at L., 75; 9 Stat. at
" L., 60, 61, etc.) And upon making default and being
" sued, prompt judgment is directed to be given, and no
" claim for a credit is to be allowed unless it has first been
" presented to the accounting officers of the Treasury for
" examination and disallowed, or unless it be shown that
" the vouchers could not be procured for that purpose, by
" reason of absence from the country, or some unavoid-
" able accident. (1 Stat. at L., 514, Sections 3, 4.)

" These provisions show that it is the manifest policy of
" the law to hold all collectors, receivers and depositaries
" of the public money to a very strict accountability. The
" legislative anxiety on the subject culminates in requir-
" ing them to enter into bond with sufficient sureties for
" the performance of their duties, and in imposing crim-
" inal sanctions for the unauthorized use of the moneys.
" Whatever duty can be inferred from this course of legis-
" lation is justly exacted from the officers. No ordinary
" excuse can be allowed for the non-production of the
" money committed to their hands. Still they are noth-
" ing but bailees. To call them anything else, when they
" are expressly forbidden to touch or use the public
" money except as directed, would be an abuse of terms.
" But they are special bailees, subject to special obliga-
" tions. It is evident that the ordinary law of bailment
" cannot be invoked to determine the degree of their re-

" sponsibility. This is placed on a new basis. To the ex-
" tent of the amount of their official bonds, it is fixed by
" special contract; and the policy of the law as to their
" general responsibility for amounts not covered by such
" bonds may be fairly presumed to be the same. In the
" leading case of the *United States* vs. *Prescott*, 3 How., 587
" (which was an action on a similar bond to that now un-
"der consideration), the Court say: 'This is not a case of
" ' bailment, and consequently the law of bailment does
" ' not apply to it. The liability of the defendant, Pres-
" ' cott, arises out of his official bond, and the principles
' ' which are founded on public policy.' After reciting the
" condition of the bond, the Court adds, with a greater
" degree of generality, we think, than the case before it
" required: 'The obligation to keep safely the public
" ' money is absolute, without any condition, express or
" ' implied; and nothing but the payment of it, when re-
" ' quired, can discharge the bond.'

" This broad language would seem to indicate an opin-
" ion that the bond made the receiver and his sureties
" liable at all events, as now contended for by the Govern-
" ment. But that case was one in which the defense set
" up that the money was stolen, and a much more
' limited responsibility than that indicated by the above
" language would have sufficed to render that defense
" nugatory. And as the money in the hands of a receiver
' is not his; as he is only the custodian of it; it would
" seem to be going very far to say that his engagement to
" have it forthcoming was so absolute as to be qualified
" by no condition whatever, not even a condition implied
" in law. Suppose an earthquake should swallow up the
" building and safe containing the money, is there no con-
" dition implied in the law by which to exonerate the re-
" ceiver from responsibility?

" We do not question the doctrine so strongly urged by
" the counsel for the Government, that performance of an
" express contract is not excused by reason of anything
" occurring after the contract was made, though unfore-
" seen by the contracting party, and though beyond his
" control—with the qualification, however, that the thing
" to be done does not become physically impossible; as,
" to cultivate an island which has sunk into the
" sea. * * *

" It is contended that the bond, in this case, has the ef-
" fect of such a special contract, and several cases of ac-
" tions on official bonds have been cited to support the
" proposition. * * * It must be conceded that the
" language used by the Court, not only in the case already
" referred to, but in some of the other cases cited, seems
" to favor the rule contended for. But in none of them
" was the defense of overruling necessity interposed.
" They were all cases of alleged theft or robbery, or some
" other cause of loss, which would have been insufficient
" to exonerate a common carrier from liability. *They all*
" *concur in establishing one point, however, of much import-*
" *ance, that a bond with an unqualified condition to account for*
" *and pay over public moneys enlarges the implied obligation of*
" *the receiving officer, and deprives him of defenses which are*
" *available to an ordinary bailee;* but they do not go the
" length of deciding that he thereby becomes liable at all
" events; although expressions looking in that direction,
" but not called for by the judgment, may have been
" used. * * * *

" It is unnecessary to examine the cases further in de-
" tail. It appears from them all (except, perhaps, the
" New York case) *that the official bond is regarded as laying*
" *the foundation of a more stringent responsibility upon col-*

" *lectors and receivers of public moneys. It is referred to as a*
" *special contract, by which they assume additional obligations*
" *with regard to the safe keeping and payment of those moneys,*
" *and as an indication of the policy of the law with regard to*
" *the nature of their responsibility.* But, as before remarked,
" the decisions themselves do not go the length of making
" them liable in cases of overruling necessity."

The Court's attention is finally called to the recent case of

U. S. vs. Zabriskie et al., 87 Fed, Rep., 714,

where the decision was rendered by Judge Hawley, sitting in the United States Circuit Court for the District of Nevada. It was there held that, under the statute, the melter and refiner in the Mint at Carson City, Nev., was liable upon his official bond for the embezzlement of his assistant, though not committed through any fault of the former. Said the learned Judge:

" How can the melter and refiner be discharged from
" his bond? He and his sureties knew the extent of his
" obligation when he entered upon the duties of his office.
" *The obligation to faithfully and safely keep the bullion, gold*
" *and silver metals, the property of the Government, committed*
" *to his charge by the Superintendent of the Mint, is absolute,*
" *without any condition whatever; and he cannot relieve him-*
" *self from this duty until the same 'is returned to the Superin-*
" *'tendent, and the proper voucher obtained,' unless, as is held in*
" *some cases, the loss thereof was occasioned by the act of God*
" *or a public enemy with whom the Government is itself at*
" *open war—an exception which has no application to this case.*
" In this connection, it is deemed proper to state that a
" certificate or voucher given to an officer before the dis-

" covery of any theft or embezzlement, 'that his accounts
" 'have been examined, found correct, and closed,' would
" not operate to release him or his sureties from liability
" on his bond (Moses *vs.* U. S., 166 U. S., 571, 17 Sup. Ct.,
682).

" It is conceded by defendants that, if the bullion and
" metals in the custody of the melter and refiner had been
" stolen by a stranger or highway robber, the melter and
" refiner would be liable for the loss. Such is undoubt-
" edly the law. It was so held in State vs. Nevin, 19 Nev.,
" 162, 7 Pac., 650. Numerous authorities bearing upon
" this point are there cited and elaborately reviewed. See,
" also, 4 Am. and Eng. Enc. Law (2d ed.), tit. 'Bonds,' p.
" 681, and authorities there cited. But counsel argue that
" there is a distinction between such cases and the pres-
" ent one, in this: That here the complaint affirmatively
" shows that the theft or embezzlement was committed
" by an independent officer of the Government, to wit, by
" the assistant melter and refiner of the Mint, without
" any neglect, carelessness or wrongdoing upon the part
" of the melter and refiner. To sustain this position, three
" cases are cited and claimed to be conclusive in favor of
" the defendants, viz.: Keenan vs. Southworth, 110 Mass.,
" 474; Dunlop vs. Munroe, 7 Cranch, 242; Robertson vs.
" Sichel, 127 U. S., 507, 8 Sup. Ct., 1286. An examination
" of these cases will clearly show that they have no appli-
" cation whatever to the facts of this case; that each re-
" lates to cases of personal negligence upon the part of a
" subordinate officer — an entirely separate and distinct
" principle from the rule of law applicable to the official
" duties of public officers, and the liabilities of themselves
" and of their sureties upon their official bonds. * * *

" In all cases of personal negligence of this general

" character, upon the part of an assistant or subordinate
" officer, it is undoubtedly true that the principal cannot
" be held liable in damages without proof that he was
" personally guilty of negligence or carelessness. But
" that is not this case. Here the action is upon a bond,
" the condition of which, according to the averments of
" the complaint, has been broken. *As a general rule, pub-*
" *lic officers with reference to the public funds or property with*
" *which by law they are entrusted, become virtually the insurers*
" *of such funds and property, and are held accountable for any*
" *and all such funds and property, even if stolen from them*
" *without any fault, negligence or carelessness upon their part.*
" The rule upon this subject is clearly and correctly stated
" in Board *vs.* Jewell, 44 Minn., 427, 428, 46 N. W., 914, as
" follows: * * * "

The Court further quotes with approval the decision of the trial Court in the case at bar (82 Fed. Rep., 290), and the decision of the Circuit Court of Appeals in the case of

Bosbyshell et al. vs. U. S., 77 Fed. Rep., 944,

and concludes as follows:

" The questions presented by counsel have received the
" care and attention which the importance of this case
" demands. They have been discussed at much greater
" length than was really necessary. If the principles
" herein announced—which hold the innocent responsible
" for the acts of the guilty—may to the layman at first
" blush seem harsh, a moment's thought will dispel the
" delusion. The ease with which frauds are now commit-
" ted against the Government demands not only that the
" perpetrators be promptly punished, but that the safe-

"guards which now protect the Government, by requir-
"ing good and sufficient bonds for the faithful perform-
"ance of the statutory duties of all public officers, should
"not be relaxed. It is substantially the only means to
"secure redress and insure the highest degree of care and
"diligence in the selection of subordinates. Any other
"rule would open the door to frauds and crimes innumer-
"able, leaving the Government without any protection.
"But, in any event it is perhaps enough to say that the
"liability of a public officer is to be measured and decided
"by the terms of the bond itself, construed, as it must be,
"in the light of the duties imposed upon him by law; and
"that the conclusions reached are supported by sound
"reason, based upon well-settled principles of public pol-
"icy, and sustained by all of the well-considered cases—
"both National and State—upon the subject."

From the foregoing views it is therefore respectfully submitted that the Circuit Court did not err in sustaining the demurrer to the amended answer herein, and its decision should be here sustained.

SAMUEL KNIGHT,
Asst. U. S. Attorney for Defendant in Error.